1970 *Present :* Weeramantry, J., and de Kretser, J.

S. WICKREMASINGHE, Appellant, *and*
D. R. DEVASAGAYAM, Respondent

S. C. 691/64 (F)—D. C. Colombo, 48289/M

Contract—Action for recovery of money—Grant of relief on basis of novation—Requirement of pleadings or issues relating to the question of novation—Evidence—Failure to reply to a business letter—Effect.

Where, in an action for the recovery of a sum of money, the basis of the defence, according to the pleadings and issues, is that there was no contractual nexus between the plaintiff and the defendant, it is not open to the Court to enter judgment for the plaintiff on the ground that there was a novation of contract between the plaintiff, a third party and the defendant and that the third party had directed the defendant to pay the sum in question to the plaintiff and the defendant had undertaken to pay it to the plaintiff. If a consideration of novation assumes importance at the stage of trial, it is necessary that a specific issue relating to novation should be raised by the plaintiff or even framed by the Court itself.

Although failure to reply to a business letter written by a plaintiff to the defendant may amount almost to an admission of a claim made by the plaintiff in that letter, the presumption may be rebutted by sworn evidence at the trial.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *B. J. Fernando*, for the defendant-appellant.

C. Ranganathan, Q.C., with *J. V. C. Nathaniels* and *M. Devasagayam*, for the plaintiff-respondent.

Cur. adv. vult.

June 8, 1970. WEERAMANTRY, J.—

The late Mr. Barr Kumarakulasinghe, Proctor, had paid to the defendant various sums of money against the purchase of an estate known as Maldeniya estate. It is common ground that this money was not the money of Mr. Barr Kumarakulasinghe but that it was made up of various sums received by him from persons desirous of purchasing portions of this estate.

The plaintiff was one such prospective purchaser and he had paid Mr. Barr Kumarakulasinghe a sum of Rs. 35,000. According to the plaintiff this sum of Rs. 35,000 was among the moneys paid by Mr. Barr Kumarakulasinghe to the defendant.

For reasons which it is not material to examine in detail the sale did not take place.

The plaintiff seeks the recovery of this sum of Rs. 35,000 on two bases set out in his plaint, namely that the money was paid to the defendant to be held by him at the disposal of the plaintiff and that at the end of October 1958 the defendant agreed and undertook to repay it to the plaintiff. Issues focussing attention on these two bases of claim were raised at the trial.

The position of the defendant was that there was no legal basis on which the plaintiff could seek to recover this money from the defendant, there being no contractual relationship between the plaintiff and the defendant. Any dealings the defendant had in this connection were not with the plaintiff but with Mr. Barr Kumarakulasinghe. When the plaintiff gave his money to Mr. Barr Kumarakulasinghe it became Mr. Barr Kumarakulasinghe's money, which he became liable to return to the plaintiff and the plaintiff's right of recovery was against Mr. Barr Kumarakulasinghe and nobody else. As far as the defendant was concerned his liability being only towards Mr. Barr Kumarakulasinghe, it did not matter to the defendant from whom Mr. Barr Kumarakulasinghe had received the money. The money paid by the plaintiff to Mr. Barr Kumarakulasinghe bore no earmark when it was paid by Mr. Barr Kumarakulasinghe to the defendant. It was pointed out further in

this connection that the plaintiff paid Mr. Barr Kumarakulasinghe the sum of Rs. 35,000 by two cheques P6 dated 23rd November 1957 for Rs. 25,000 and P3 dated 28th November, 1957 for Rs. 10,000. Mr. Barr Kumarakulasinghe held a receipt P8 dated 24th November 1957 from the defendant for a payment of Rs. 47,500 made by him being 1/10th deposit towards the purchase of the estate and the plaintiff's position was that the sum of Rs. 35,000 he claimed was part of this deposit. Now, the cheque P2 had been deposited only on the 25th (*vide* Bank statement P4B) as the 24th was a Sunday and the Cheque P3 was subsequent to the receipt P6, thus confirming that it would be impossible in any event to identify Rs. 35,000 out of the sum paid by Mr. Barr Kumarakulasinghe to the defendant as being the plaintiff's money.

It will be seen, in view of the position taken up by the defendant, that it was essential to the success of the plaintiff's claim that he should be able to establish a contractual nexus between himself and the defendant, for without it the money received by the defendant would ordinarily have had to be returned to Mr. Barr Kumarakulasinghe who alone could have claimed it. When the plaintiff sought to recover it himself he assumed the burden of establishing such a nexus.

One would gather from the plaint and the issues suggested that this was sought to be done by alleging that there was a distinct agreement or understanding that the money was paid to the defendant to be held by him at the disposal of the plaintiff or alternatively that at the end of October 1958 there was a separate agreement by which the defendant undertook to repay this money to the plaintiff.

As I shall presently observe it was conceded by learned Queen's Counsel for the plaintiff-respondent that the first of these bases did not truly represent the position, for there is no evidence whatsoever to support the contention that at the time the money was paid there was any agreement or understanding that it was to be held at the disposal of the plaintiff. According to the documents such a direction if given at all was given much later and this will presently be referred to in greater detail.

The plaintiff's case is thus reduced to dependence on the second ground indicated, namely, an agreement by the defendant at the end of October 1958 to repay the money to the plaintiff and indeed learned Queen's Counsel who appeared for him at the trial has categorically stated to Court at the stage of addresses that if the Court holds that in October 1958 there was no agreement by the defendant to pay the plaintiff, the plaintiff has no claim.

The learned District Judge has in his judgment rejected the position that there was a contract between the plaintiff and the defendant in respect of this sum of Rs. 35,000 and has upheld the defendant's contention on this matter. He has however gone on to hold that there was a novation of contract between the plaintiff, Mr. Barr Kumarakulasinghe and the

defendant and that Mr. Barr Kumarakulasinghe directed the defendant to pay this sum to the plaintiff and the defendant undertook to pay it to the plaintiff.

Now, a novation in the circumstances of this case could not be effected by a mere agreement between the defendant and the plaintiff, for an essential party to the novation would be Mr. Barr Kumarakulasinghe, and the essence of such a contract would be that Mr. Barr Kumarakulasinghe was ceding his rights to the plaintiff. The pleadings and the issues in question did not visualise this position at all. The issues in the form in which they have been framed suggest on the contrary an agreement by the defendant to pay the plaintiff this sum of money, and as learned Queen's Counsel for the defendant pointed out at the trial, there could be no liability on this basis, the only possible basis of liability being an agreement to which Mr. Barr Kumarakulasinghe was a party. If the plaintiff's position was that there was a novation in the sense of cession to the plaintiff by Mr. Barr Kumarakulasinghe of the latter's right of action against the defendant, that was a matter which should have been pleaded and expressly put in issue, for it envisages a contractual relationship very different from a mere agreement by the defendant to pay the money in question to the plaintiff. It has therefore been strenuously contended before us at the hearing of this appeal by learned Counsel for the appellant that in the absence of any pleading to this effect or any issue on the matter, it was not open to the learned Judge to enter judgment for the plaintiff on the basis of novation.

If a consideration of novation did assume importance at the trial it is unfortunate that the question of novation was never put in issue by the parties or for that matter framed by the learned Judge himself, but as things stand we are constrained to hold that there is no issue on the strength of which the Judge could have entered judgment for the plaintiff on the basis of novation.

Indeed except in exceptional circumstances a cession of contractual rights would not require even the consent of the original debtor[1] and the essential parties to that contract would be Mr. Barr Kumarakulasinghe and the plaintiff. This matter assumes more importance in the light of the fact, already mentioned, that although two bases of liability were set out in the pleadings and the issues, the first of them was untenable and the plaintiff had thus to depend on only one substantial basis of claim—that there was a contract or agreement in October 1958. In this contract as referred to in the pleadings and the issue Mr. Kumarakulasinghe does not figure at all. The contract pleaded and put in issue is thus different from the contract of novation not only in respect of its nature and content but also in regard to the contracting parties themselves.

[1] *Wille, Principles of Roman-Dutch Law, 5th ed., p. 360; Lee, Roman-Dutch Law, 5th ed., p. 273.*

We do not think it right, when a party has been brought to Court upon a particular basis of liability, and the trial has also proceeded upon that basis, that judgment should be entered against him on a different basis of which, if that be the footing on which he was sought to be made liable, he was entitled to be apprised in advance. Moreover it is not possible for us, sitting in appeal to rule out the possibility that, had it been a case of novation that was set up and put in issue, the defendant may have led other evidence to meet such a case.

Learned Counsel for the plaintiff-respondent in an effort to support the course followed by the learned District Judge has drawn attention to an issue framed by counsel for the defendant at the trial on the question whether the defendant was liable to pay the plaintiff the sum of Rs. 35,000. This issue read literally is in such ample terms as to cover any conceivable basis of liability, and is therefore called in aid as affording a basis for a finding of novation.

Had this issue in fact meant that any conceivable basis of liability not visualised in the pleadings could be sprung upon the defendant, one is more than surprised that it was raised by defendant's counsel. Upon closer examination however it would appear that this issue was never meant to be understood as being of such amplitude, for what was sought to be emphasised was that the claim, by whomsoever else it might have been sustainable, was certainly not sustainable by the plaintiff. The issue in question is based upon paragraph 4 of the defendant's answer, which, in reply to paragraph 6 of the plaint, denies liability on the part of the defendant to pay the plaintiff the sum of Rs. 35,000 or any part thereof. Paragraph 6 of the plaint in its turn avers specifically that a cause of action has accrued to the plaintiff against the defendant on the two bases already indicated. The cause of action denied in paragraph 4 of the answer is thus not a cause of action upon any possible basis of claim but a cause of action founded on the grounds already indicated. The basis of the defence was that there was no nexus between the plaintiff and the defendant, the defendant's relationship having been throughout with Mr. Barr Kumarakulasinghe, and the issue under discussion merely emphasises that even if the grounds alleged disclose a liability to pay, such liability is not towards the plaintiff.

For these reasons we consider that it too far offends the principles governing pleadings and issues that the defendant should be held liable upon the basis on which judgment has been entered against him.

It remains then to examine the correctness of the other finding of the learned judge, namely that there was no contract between the plaintiff and the defendant in respect of the sum of Rs. 35,000, for it has been strenuously contended that there was material placed before the learned judge indicative of such a contract.

Before proceeding to a more detailed examination of the evidence for this purpose, I should perhaps at this point put out of the way the plaintiff's first basis of claim by explaining in greater detail the reasons for its untenability. This first ground of claim, pleaded in paragraph 4 of the Plaint, is that the sum of Rs. 35,000 was paid by Mr. Barr Kumarakulasinghe to the defendant to be held by the defendant at the disposal of the plaintiff, thereby suggesting that the condition that it was to be held by the defendant at the disposal of the plaintiff was a condition attaching to the payment at the time it was made. Now this is not truly the plaintiff's position, for his own evidence reveals that there was no such condition attached at the time of payment. This matter becomes quite clear when one looks at the document P7 from which apparently this phraseology has been borrowed. This language, indicating the position at a much later point of time, has in the plaint been attached to the payment itself, a position which even the plaintiff does not now seek to support, and which learned Queen's Counsel appearing in appeal for the plaintiff conceded was not the plaintiff's position.

Describing this paragraph of the plaint as one 'inartistically drafted' he strongly submitted that we should read into this issue something he contends was understood by all parties at the trial, namely that it meant that, by reason of an agreement or direction *subsequent* to the payment of the sum, it was to be held by the defendant at the disposal of the plaintiff.

Here again I am afraid that where so important a matter is left unsaid, the Court would not be justified in altering the entire purport of the issue by reading into it words which are not there; nor indeed is it by any means clear that parties proceeded on the basis that they understood the issue in the sense contended for.

I pass now to an examination of the evidence regarding the agreement of October 1958. On this question, as will presently appear, the plaintiff's own oral evidence is directly opposed to the contention that the parties reached such an agreement in October 1958. I shall refer presently in greater detail to all the evidence bearing on such an alleged agreement and it is remarkable that although the plaintiff seeks from the documents to have the inference drawn that such a contract or agreement was made in October 1958, his oral evidence runs counter to any such contention.

It would be well at this stage to recapitulate the respective positions of parties as emerging from the evidence led at the trial.

According to the plaintiff's evidence, Mr. Barr Kumarakulasinghe had been a classmate of his at school and was therefore very well known to him. Some time in 1957 the latter had suggested to him that he should invest his money in the purchase and resale of Maldeniya estate. The land was to be blocked out and sold. For this purpose he was asked to

put in a sum of Rs. 35,000 as a deposit. He understood from Mr. Barr Kumarakulasinghe that the latter had made arrangements for the purchase of the estate and that the balance sum would be put in by him.

The plaintiff gave Mr. Barr Kumarakulasinghe the money by the two cheques P2 and P3 of November 23rd 1957 and November 28th 1957 for Rs. 25,000 and Rs. 10,000 respectively. Two cheques were paid as the plaintiff did not have the full sum but had to withdraw Rs. 10,000 from his Savings Bank.

The transaction did not go through as contemplated because *inter alia* the Fragmentation Act was passed making the permission of the Fragmentation Board requisite to such a transaction, and this Act came into operation on 11th December 1957. In consequence there was delay, and arrangements were still being made to sell it when Mr. Barr Kumarakulasinghe died on 17th December 1958.

The plaintiff produced a receipt in the handwriting of Mr. Barr Kumarakulasinghe marked P1 dated 28th November 1957 showing that Mr. Barr Kumarakulasinghe acknowledged receiving from the plaintiff a sum of Rs. 35,000 by two cheques, to be utilised for the purchase and sale of Maldeniya estate.

The receipt P6 already referred to by which the defendant acknowledged receipt of this sum from Mr. Barr Kumarakulasinghe as 1/10th deposit, records that it was agreed that if the purchase was not completed on or before the 26th day of February 1958 this sum was to be forfeited and Mr. Barr Kumarakulasinghe would have no claim whatsoever to the same or any part thereof. This receipt, it is to be noted, is signed on a –/06 cents stamp without witnesses and is an agreement which is of no force or avail in law in view of the provisions of the Prevention of Frauds Ordinance.

" Towards the end of 1958 the plaintiff, desiring to recover his money, saw Mr. Barr Kumarakulasinghe and asked for an accounting of the money received. At that time he had paid Mr. Barr Kumarakulasinghe altogether a sum of Rs. 57,000. Mr. Barr Kumarakulasinghe gave him an assignment of three Insurance Policies for Rs. 22,000 leaving a sum of Rs. 35,000 due. This sum of Rs. 35,000 was included according to the plaintiff in the sum of Rs. 47,500 which was paid to the defendant by Mr. Barr Kumarakulasinghe. In proof of the fact that Rs. 35,000 paid by Mr. Barr Kumarakulasinghe to the defendant represented the moneys of the plaintiff, the plaintiff produced a document P7 written by Mr. Barr Kumarakulasinghe on 8th September 1958. This was a letter addressed to the defendant stating that the sum of Rs. 35,000 handed to him by Mr. Barr Kumarakulasinghe was part of the advance deposited with Mr. Barr Kumarakulasinghe by the plaintiff against the purchase price of the estate; and that the amount of Rs. 35,000 was to be held by the defendant at the disposal of the plaintiff. It further stated that if the

transaction did not materialise on or before 31st October 1958 the defendant was authorised to refund the said sum of Rs. 35,000 direct to the plaintiff.

This was one of several documents to which I shall refer later, whose reception was objected to by the defendant, but which were admitted as being documents against the interest of the maker.

Tho document went on to request confirmation of this arrangement by the defendant, and the suggested confirmation was typed in at the foot of the document to the effect that the defendant agreed to hold this sum at the plaintiff's disposal and to refund the entire amount to him should the transaction not materialise on or before 31st October 1958.

It was the plaintiff's position that he handed the original of P7 to the defendant who did not sign it but said that the permission of the Fragmentation Board had been obtained and stated that now that it had been obtained there was no reason to worry about the transaction. The plaintiff, not wishing the defendant to know that he suspected him, thought it better to " hang on " as he would be benefited if the transaction went through, but kept pressing Mr. Barr Kumarakulasinghe.

The latter from his sick bed wrote three letters all bearing the date 25th October 1958. Of these, P10 addressed to the plaintiff, was an appeal to the plaintiff not to worry him as he was very sick. It contained statements that his money was safe in the hands of the defendant, that the defendant had told the plaintiff that he had the sum of Rs. 35,000 with him and that the defendant had told the plaintiff that he would pay the sum to the plaintiff if Mr. Barr Kumarakulasinghe instructed him to do so. The letter P10 contained further appeals by Mr. Barr Kumarakulasinghe to the plaintiff not to worry him and to leave him in peace. With this letter he enclosed the other two letters to be made use of in order to draw the money. These two letters were the letters P8 addressed to the plaintiff and P9 addressed to the defendant.

The letter P8 to the plaintiff contained an undertaking by Mr. Barr Kumarakulasinghe not to draw this amount of Rs. 35,000 from the defendant or to account for this amount on account of amounts due on the sale. It also recited that the defendant had promised to pay the plaintiff this sum after 31st October 1958 which was the final date given for the completion of this sale.

The letter P9 by Mr. Barr Kumarakulasinghe to the defendent requested him to pay to the plaintiff the sum of Rs. 35,000 deposited by Mr. Barr Kumarakulasinghe with the defendant on account of the purchase and sale of Maldeniya estate.

The plaintiff states that he took the letter P9 to the defendant who said that the matter would come through.

While the negotiations were in this state of incompleteness Mr. Barr Kumarakulasinghe died on 17th December 1958 but even at that stage the transaction had still not been abandoned. This would appear from the fact that as late as 12th December 1958, five days before Mr. Barr Kumarakulasinghe's death, the defendant wrote the letter P19 to his proctors requesting them to allow Mr. Barr Kumarakulasinghe to remove the plans of the estate for reference and return. Moreover the plaintiff states that at no stage did he come to know that the property was not going to be sold and that the sale was stopped because of the death of Mr. Barr Kumarakulasinghe.

Thereafter the matter took a new turn when Mr. Advocate Yatawara appeared on the scene. Mr. Yatawara was a relative of the defendant, and the plaintiff and Mr. Yatawara along with the plaintiff's proctor interviewed the defendant, who according to the plaintiff stated on that occasion that several people were claiming much more than the money he had received and that he proposed to take the matter to court and file an interpleader action. This action was not in fact filed. The letter P13 was then sent by the plaintiff's proctor to the defendant stating that the plaintiff had interviewed him along with counsel and that on that occasion the defendant had admitted that there was a sum of Rs. 35,000 belonging to the plaintiff which had been deposited with the defendant by Mr. Barr Kumarakulasinghe on account of the purchase of Maldeniya estate. It was alleged in this letter that the defendant had stated to counsel that he proposed to file an interpleader action. This letter dated 9th February 1959 as well as letter P17 dated 26th March 1959 drawing attention to it and demanding the sum of Rs. 35,000, remained unanswered by the defendant.

The defendant's position in evidence was a denial that the plaintiff had ever met him or telephoned him about this transaction till Mr. Barr Kumarakulasinghe's death and is therefore a complete contradiction of any evidence by the plaintiff whereby he seeks to establish an oral agreement by the defendant to pay him this money.

The defendant stated that his dealings were with Mr. Barr Kumarakulasinghe and that Mr. Barr Kumarakulasinghe was proposing to sell the estate in blocks to various people and in that connection had made an application to the Fragmentation Board. The Fragmentation Board gave the requisite permission in August 1958 and in consequence of this delay arising from the Fragmentation Act the defendant wanted further time and was granted further time. Nobody other than the plaintiff saw the defendant in connection with this transaction but after the death of Mr. Barr Kumarakulasinghe various people came to the defendant stating that they had advanced moneys to Mr. Barr Kumarakulasinghe. The defendant refused to give them the money they claimed on the basis that the money he had should go to the estate of Mr. Barr Kumarakulasinghe. The defendant was sued by various people including one Stanley Fernando for Rs. 47,500, one Jayawardene

and a Buddhist priest. The defendant admitted that Mr. Yatawara came to see him but said that he told Mr. Yatawara that he had no money belonging to the plaintiff, that the money was Mr. Barr Kumarakulasinghe's and that whatever moneys were lying with him were due to Mr. Barr Kumarakulasinghe. The first time he saw the plaintiff was after Mr. Barr Kumarakulasinghe's death and at no time prior to Mr. Barr Kumarakulasinghe's death did he have any indication that anybody else had anything to do with this matter.

He admitted that he did not reply to the letter of demand and stated that he felt it was not necessary as it was so long after Mr. Yatawara had seen him. He denied having received letter P13 of 9th February 1959, that is the first letter by the plaintiff's proctor to the defendant making allegations that the defendant had stated he meant to file an interpleader action.

I shall now proceed to an analysis of the evidence adduced by the plaintiff with a view to examining whether any reason exists for interference with the learned Judge's finding that there was no contract between the plaintiff and the defendant relating to the return of this sum of Rs. 35,000.

An examination of the evidence adduced by the plaintiff on the question of an agreement between the defendant and himself reveals that it consists of three groups—oral evidence, documentary evidence and the presumptions arising from the defendant's failure to reply to certain letters.

The oral testimony consists of the evidence of the plaintiff himself and his proctor Mr. Rajaratnam. The documentary evidence consists of the letters referred to, some of them being writings of the late Mr. Barr Kumarakulasinghe. The admissibility of the latter group of documents was challenged at the trial on behalf of the defendant, but the learned Judge admitted these documents as containing declarations against the interest of the deceased maker. Although there are portions of these documents which are not declarations against interest, still it seems to me that by and large these documents were correctly admitted, for unquestionably they do contain declarations against the interest of the maker. I shall therefore, proceed to examine the questions arising, on the assumption that the documents are admissible, without entering upon a detailed inquiry as to whether each separate statement contained therein constituted a declaration against interest. The third class of evidence relied on, the presumptions arising from the defendant's failure to reply to letters of the plaintiff and his proctor, related to the documents P12, P13 and P14. I shall examine each of these groups of evidence in turn.

The plaintiff's oral testimony reveals the following conversations and meetings between the plaintiff and the defendant regarding this transaction up to and including the interview which Mr. Yatawara

attended: (*a*) in cross-examination the plaintiff states that he made enquiries immediately after coming to know of this matter and the defendant told him that he proposed to sell the estate. He told him over the telephone that he would sell the estate to Mr. Barr Kumarakulasinghe. The plaintiff states that he made this inquiry from the defendant because he wanted to make sure of the transaction and then the plaintiff told him that Rs. 35,000 had been deposited with Mr. Barr Kumarakulasinghe.

The plaintiff's position is that thereafter he used to ring the defendant very often and the latter confirmed the fact that the sale was going through.

(*b*) The plaintiff says that he handed over the original of P7 dated 8th September 1958 to the defendant and that the latter did not give it back. The defendant told him on that occasion that the permission of the Fragmentation Board had been obtained and he said that now that this permission had been obtained he should not worry about it. The plaintiff thought he had better "hang on" as he would be benefited if the transaction went through. In regard to this meeting when he took P7 to him he repeats at another point in his evidence that the defendant stated that he had obtained permission from the Fragmentation Board and that the plaintiff should not worry about it. (*c*) The plaintiff says that he took the original of P9 to the defendant who said that the matter would go through and the plaintiff said it was all right. In regard to the conversation when he took the letter P9 the plaintiff repeats in cross-examination that the defendant told him to hold on and that he had no alternative but to hold on. The plaintiff states at another point in his evidence that the defendant told him that the statement in the letter was correct. (*d*) After the letter P12 had been sent by the plaintiff to the defendant there was the interview attended by the plaintiff's proctor and Mr. Advocate Yatawara, at which the defendant said that it was true that he had taken Rs. 95,000 in all and that he proposed to file an interpleader action as several people were claiming much more.

The conversation between the proctor, Mr. Yatawara and the defendant was spoken to by the proctor Mr. Rajaratnam who said that the defendant admitted that Rs. 35,000 out of the Rs. 95,000 which he had got from Mr. Barr Kumarakulasinghe belonged to the plaintiff and that as several people were claiming the money there was to be an interpleader action.

I may here observe that I will for the purpose of examining this evidence proceed on the footing of the learned District Judge's acceptance of the evidence of the plaintiff in preference to that of the defendant, and accept the totality of the plaintiff's evidence as true.

No single item in this evidence reveals an understanding that the defendant was to hold the money he was paid at the disposal of the plaintiff or any agreement by him in October 1958 or thereabouts to return it to the plaintiff. On the contrary it is express evidence that far from agreeing to return the money the defendant was holding out to the plaintiff that the transaction was still going through, a position which, whether reluctantly or otherwise, the plaintiff was prepared to accept.

What is more, the very fact that the defendant spoke of an interpleader action is an indication of his unwillingness to return the money, for an interpleader action would be meaningless in the context of an agreement to return the money to the plaintiff. This very evidence then again runs counter to the case of the plaintiff that there was any such agreement.

We thus see that any possibility there might be to infer from the documentary evidence that there was such an undertaking or agreement is not only negatived by the specific oral evidence of the plaintiff himself that the defendant (as well as the plaintiff) was expecting the transaction to go through, but is also quite inconsistent with the version of a declared intention on the part of the defendant to file an interpleader action.

I pass now to a consideration of the documentary evidence in the light of these observations.

The following are the items of documentary evidence relevant to this matter :

(*a*) P6—the receipt dated 24th November 1957 from the defendant to Mr. Barr Kumarakulasinghe for Rs. 47,500.

(*b*) P7—the letter dated 8th September 1958 by Mr. Barr Kumarakulasinghe to the defendant stating that the sum of Rs. 35,000 is part of the advance deposited with Mr. Barr Kumarakulasinghe by the plaintiff and that this amount is to be held by the defendant at the disposal of the plaintiff.

(*c*) P8, P9 and P10—the group of letters of 25th October 1958 of which P8 contains reference to a promise by the defendant to pay him (the plaintiff) this amount and P10 refers again to his having told the plaintiff that he would pay it to the plaintiff if instructed to do so, and also stating that the defendant had been directed to pay it to the plaintiff.

(*y*) P12 of 26th December 1958 by the plaintiff to the defendant alleging that on the occasion of his receiving the letter of 25th October 1958 he had agreed to pay the sum of Rs. 35,000 by instalments.

(*e*) P13—a letter from plaintiff's proctor to the defendant dated 9th February 1959 stating that the defendant had admitted that there was a sum of Rs. 35,000 belonging to the plaintiff which was deposited with him by Mr. Barr Kumarakulasinghe.

(*f*) P14—proctor's reminder of 26th March 1959 in respect of letter P13.

The conflict between this documentary evidence and the oral evidence will by now have become apparent. The statements in the letter that the defendant had promised to pay this sum to the plaintiff ill accord with the oral evidence that when the letter P7 of September 1958 was taken to the defendant, he stated that the permission of the Fragmentation Board had been obtained and that the plaintiff should not now worry about it, and that when the letter P9 was handed over he said that the matter would go through and requested him to hold on. The plaintiff having had an opportunity of giving specific oral evidence of such a promise has not only failed to do so but has given an account which conflicts with such a version.

No doubt where a plaintiff has erred in his evidence or has failed to give a correct version for some reason or other, where the documentary evidence clearly establishes the true position and can unhesitatingly be acted upon, one may in an appropriate case hold on the basis of the documentary evidence despite the failure of the plaintiff to speak to his version of matters correctly. But where the plaintiff's oral evidence conflicts with his own case and with his documents it certainly becomes difficult for the court to act upon the documents to the exclusion of the oral testimony.

Furthermore when the documents themselves are far from clear and do not precisely state when and to whom the promise was made the position becomes all the more difficult. It will be noted that P10 and P12 do not say to whom the promise was made and furthermore P10 contains hearsay upon hearsay in that the statement of the deceased person apparently reports a version given to him by the plaintiff of a conversation which the defendant had with the plaintiff. The plaintiff himself having had the opportunity of stating what this conversation was when he gave his oral evidence has failed to do so and P10 is thus a most uncertain guide. The plaintiff is also met by the telling circumstance that although P7 contained at its foot a suggested agreement for signature by the defendant, the defendant did not sign it thus indicating that at that stage at any rate he was not desirous of entering into a binding agreement, whatever his views may have been regarding the party to whom the money should be paid.

We are left finally with the presumptive evidence resulting from the failure to reply to P12, P13 and P14. Of these three letters P12 alone asserts an agreement to pay, for P13 speaks only of an admission that the money belonged to the plaintiff and P14 is but a reminder in respect of P13. The defendant has denied receipt of P12 and it is to be observed that the registered postal article receipt P12A which has been produced is not a document proving receipt by the recipient but only proving receipt by the post office of a document addressed to the defendant. It is therefore not the best possible evidence of receipt by the defendant which the

plaintiff could have adduced. However, assuming that this document was received, one would certainly expect a reply from the defendant denying the allegation therein that he had agreed to pay this sum by instalments so that presuming receipt, it leads to the inference that the facts it states are presumably true. That is however only a presumption and the defendant has on oath denied these facts while the plaintiff having had an opportunity to speak to these facts has given a version which does not accord therewith. We find it difficult therefore to accept the defendant's submission that failure to reply to P12 establishes an agreement by the defendant to pay this sum. It may also be observed that even the case of *Colombo Electric Tramways & Co. v. Pereira*[1] which was heavily relied on by the plaintiff does not go the length of saying that failure to reply to a business letter proves the truth of the contents of the letter but only that it amounts *almost* to an admission. Thus, although the failure to reply to this letter is a circumstance which may be urged against the defendant, it cannot by itself prove the plaintiff's case.

Of the document P13 I have already observed that it does not contain a statement that the defendant had promised, but only that he had admitted this sum to belong to the plaintiff. It was consistently the defendant's position that he was not claiming the money to be his own and the mere admission that it belonged to the plaintiff does not carry the plaintiff's case much further even if an adverse inference is drawn from the failure to reply to P13. This is a far cry from the concluded contract which the plaintiff must prove in order to obtain relief.

The burden lay upon the plaintiff of establishing the contract on the basis of which he sought relief, and we are afraid the Court is quite unable in the present case to puzzle out a contract from the bits and pieces of evidence placed before it, more especially when the plaintiff himself has failed in his evidence to assist the Court in regard to this central question.

For these reasons we conclude that the plaintiff has failed to establish that either at the time the money was paid or in October 1958 the defendant undertook to repay this money.

Much as this Court would be anxious to help the plaintiff to recover the money which he has expended on this fruitless venture, there seems no basis of law or fact on which he can be awarded judgment against the defendant upon the case which he has presented ; and much to our regret we find ourselves unable to assist him in its recovery. This observation does not however amount in any way to a condonation of the conduct of the defendant whose failure to pay back this money either to the estate of Mr. Barr Kumarakulasinghe or to the plaintiff, or, if he were in doubt, to file an interpleader action, is conduct we strongly deplore. This Court cannot however give effect to its sympathy for the plaintiff and its displeasure with the defendant at the expense of so wide a departure from legal principle.

[1] *(1923) 25 N. L. R. 193.*

In the result we conclude that the judgment and decree of the learned District Judge should be set aside and that the plaintiff's case must fail. The plaintiff's action is accordingly dismissed. There will be no order for costs in favour of the defendant either in this Court or in the Court below.

DE KRETSER, J.—I agree.

Judgment set aside.