Present. Schneider J. and Jayewardene A.J. 1923.

PALANIAPPA CHETTY *v.* MORTIMER.

178—D. C. Kandy, 29,887.

*Civil Procedure Code, s. 34—Cause of action—Debt due on account stated—Note given by son for father's debt—Action on the note against son—Subsequent action against administrator of father's estate on account stated—Deposit—*Arraha *earnest money.*

T owed plaintiff Rs. 4,000 on an account stated. T's son gave a note for this sum to secure the amount due by T. Plaintiff obtained judgment against T's son on the note. T died leaving an insolvent estate, and a meeting of the creditors exceeding six-sevenths in number, including plaintiff, was held, and all the creditors agreed to take a transfer of an estate in shares proportionate to their claims in discharge thereof. Plaintiff subsequently backed out, and the estate was transferred to the other creditors, leaving out plaintiff's share. Plaintiff sued the administrator on account stated for Rs. 4,000.

Held, that section 34 of the Civil Procedure Code did not bar the action, as the cause of action against T's son and against the administrator was not the same within the meaning of section 34.

Plaintiff did not forfeit the money due to him from the administrator of T's estate by reason of his backing out of the sale.

Money of the purchaser lying in the hands of the vendor, and not given as a deposit or agreed to be treated as a deposit cannot be regarded as a deposit, "earnest," or "arraha" given on the occasion of the agreement to purchase; and cannot, therefore, be forfeited if the sale falls through owing to the default of the purchaser.

The provision of section 34 of the Civil Procedure Code, which enacts that for purpose of this section "an obligation and a collateral security for its performance shall be deemed to constitute one cause of action" refers to cases where an obligation is incurred and the collateral security is given by the same person or persons.

IN this case plaintiff sued the defendant for a sum of Rs. 4,000 on an account stated on June 15, 1918, between plaintiff and the late Thewaraya Pillai, with interest and costs.

The defendant pleaded that the promissory note sued upon in District Court of Kandy, case No. 29,065, had been made in favour of the plaintiff in this case by the deceased Thewaraya Pillai's son, T. A. Periasamy Pillai, in satisfaction of the above debt, and that the judgment in such case No. 29,065 was a bar to plaintiff's claim.

The defendant pleaded in the alternative that the plaintiff had compromised the said claim by an agreement entered into by him on February 18, 1922, and that he was estopped by reason of such compromise from suing on the account stated.

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At the trial on March 2 and 13, 1923, the following issues were framed :—

(1) Is the plaintiff debarred from maintaining the present action ?

(2) Was the plaintiff bound by his verbal consent to the proposed compromise, or was he at liberty to withdraw his consent ?

The District Judge (Dr. P. E. Pieris) held in favour of the plaintiff by the following judgment :—

It is admitted that on an account stated between plaintiff and the late Tewaraya Pillai on June 15, 1918, a sum of Rs. 4,000 was found to be due to the plaintiff. He has brought this action against the official administrator of the debtor's estate to recover the amount found so due, with interest. The claim has been met by two lines of defence, which will be dealt with separately. The first defence is as follows : It is admitted to be the fact that the plaintiff has received from Periyasami Pillai, the son of Tewaraya Pillai, a promissory note for the amount found to be due from the father, and that this note was made as security for the father's debt. The plaintiff sued on this note in D. C. 29,065 and obtained judgment, but no steps have been taken to satisfy the judgment. It is argued that on this state of facts the plaintiff is debarred from maintaining the present action. Reliance is placed on section 34 of the Code, under which a plaintiff must in one action deal with the whole of his claim in respect of the cause of action, and an obligation and a collateral security for its performance are deemed to constitute but one cause of action. This, however, refers to a collateral security given by the debtor himself. In the present case it is no doubt the case that the sum of money contemplated by both Tewaraya Pillai and Periyasami Pillai is the same, namely, what was due from the former on certain transactions. But the cause of action in respect of the two are very different. Against Tewaraya Pillai it is that he failed to pay what he agreed was due on an accounting. Against Periyasami Pillai it is that he failed to meet the amount due on a promissory note.

The judgment of the Privy Council in *Palaniappa v. Saminathan* in *17 N. L. R. 56*, with regard to the scope of section 34, is against the defendant's contention.

It is suggested that Periyasami acted as substitute for his father, the original debtor, in making the note. This cannot be conceded. There is also a suggestion of novation, but that is hardly pressed, for the existence of Tewaraya Pillai's debt was admitted by everyone interested in his intestate estate. The second line of defence is as follows.

It is admitted that nineteen of Tewaraya Pillai's creditors, representing a very large claim, and including among them the plaintiff, met the defendant, and an agreement was come to by which each of the nineteen agreed to accept a certain share in a land belonging to the estate, in full satisfaction of all his claims. A written agreement was drawn up in confirmation of this arrangement, but by that time the plaintiff had changed his mind and withdrew his consent, and refused to sign the writing. Thereupon application was made to the Court in the testamentary case, and authority was obtained to transfer to the eighteen consenting creditors the shares which they had agreed to accept. In pursuance of the authority so granted, the deed P 1 was executed by administrator and the eighteen creditors. It is argued that having

verbally consented, the plaintiff is bound by his promise. That is a matter of pure law, but no authority has been quoted in support of this contention. There was a suggestion that the plaintiff is estopped on the ground of part performance by the other side induced by the plaintiff's promise. That, however, is not the case, for the performance by the others, namely, the execution of the deed P 1, was made with the full knowledge of the defection of the plaintiff. His promise did not in any degree influence the execution of the deed.

In the absence of authority on the point, I am not prepared to hold that the plaintiff is bound by a verbal agreement which was promptly repudiated on reconsideration.

Samarawickreme (with him *Hayley*), for defendant, appellant.

H. V. Perera, for plaintiff, respondent.

October 18, 1923. JAYEWARDENE A.J.—

In this case the plaintff has obtained judgment against the administrator of the estate of one Thewaraya Pillai for a sum of Rs. 4,000 due on an account stated. Thewaraya Pillai's son, Periasamy Pillai, had given a promissory note for Rs. 4,000 to secure the amount due from his father. The plaintiff had sued the maker of the note and obtained judgment against him in case No. 29,065. Thewaraya Pillai died leaving an insolvent estate of which the Secretary of the Court has been appointed administrator. Subsequently a meeting of the intestate's creditors exceeding six-sevenths in number was held, at which the plaintiff was also present, when an agreement was come to with the consent of all the parties concerned, by which the creditors agreed to take a transfer of " Kelvin estate " belonging to the intestate's estate in shares proportionate to their claims in discharge thereof. The plaintiff afterwards withdrew from this agreement and arrangement, and the estate was transferred to the other creditors, leaving out the share which the plaintiff had undertaken to accept. Thereafter the plaintiff brought the present action to recover a sum of Rs. 4,000 due on the account stated. Several objections were raised to this claim, but the learned District Judge has decided them in plaintiff's favour. The defendant appeals, and the same objections have been pressed before us. In the first place, it is contended that the giving of the note by the son was an extinguishment of the debt of the father, and that there had been a novation. I am strongly inclined to think that the note extinguished the father's debt, and that the intention of the parties was to create a novation, but no issue has been raised on the point and no evidence has been led by the defendant, and the admissions of the parties on which the case was decided fail to show the creation of a novation. An issue was framed on the admission of the plaintiff that he obtained the note merely as a security, and not in discharge of the amount due by the father, and the issue framed on this admission

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was "On the above admission is the plaintiff debarred from maintaining the present action?" The defendant did not ask for an opportunity to lead evidence to prove that the note was given in payment of the father's debt, nor does the defendant ask for such an opportunity in his petition of appeal, nor does he complain that he has been prejudiced by the case being decided on admissions. The learned District Judge has decided this issue in the negative, and I think that on the admissions recorded his decision is right. It is also contended that the judgment in the promissory note case is *res judicata* by virtue of section 34 of the Civil Procedure Code, which enacts that, for purpose of this section, "an obligation and a collateral security for its performance shall be deemed to constitute one cause of action," and that, therefore, the present action cannot be maintained, as the present claim ought to have been included in the action on the note. I do not think this objection is sound. I think that section 34 refers to cases where an obligation is incurred and the collateral security is given by the same person or persons. I do not think it applies to cases where the obligation is incurred by one person and the security is given by another. "As to section 34," said Bertram C.J. in *Moraes v. Nallan Chetty*,[1] "the remedies there referred to seem to me to be remedies which might be sought against the same defendant." It may be that when the person liable on the security is sued, he is entitled to ask for a stay of the action until the principal debtor is first sued and his assets discussed, as happened in *Wijewardene v. Jayawardene*,[2] or, this being a security created by a promissory note, the maker of the note may be sued before the excussion of the principal debtor. *Palaniappa Chetty v. De Mel.*[3]

Next, it was argued that the plaintiff was estopped by his conduct in agreeing with the other creditors to the arrangement to take a share of "Kelvin estate" in satisfaction of the debts due by the intestate. The plaintiff withdrew from this arrangement while matters were still in negotiation, and the defendant and the other creditors were fully aware of the plaintiff's withdrawal before the deed of transfer was signed and the agreement concluded. In the circumstances it cannot be said that the plaintiff by his acts or declarations induced the other creditors and the defendant to enter into the agreement. There can, therefore, be no estoppel. His original agreement to accept the arrangement cannot be enforced, as it involved an interest in land and was non-notarial.

Finally, it is contended that the debt due to the plaintiff must be regarded as payment of the purchase money for a share of "Kelvin estate," and as the sale has gone off owing to the default of the plaintiff, the prospective vendee, the defendant, as vendor, is entitled to retain the money on the same principle as the forfeiture

[1] *(1923) 24 N. L. R. 297, at p. 302.* [2] *(1919) 19 N. L. R.*
[3] *(1913) 16 N. L. R. 242.*

of a deposit on an informal agreement to sell. In support of this contention reliance is placed on *Nagur Pitche v. Usoof*.[1] I do not think the principle of this case has any application here. There this Court adopted the principle derived from certain English cases and stated in *Halsbury's Law of England* (*vol. XXV., p. 402*) thus :—

> " Where a deposit has been paid under a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the Statute of Frauds, is liable to return the deposit as money had and received to the use of the purchaser; but it seems that if the purchaser sets up the statute in order to escape from his contract he cannot recover the deposit."

In that case the Court found that the plaintiff deposited a sum of money on condition that if he failed to take the lease the deposit should be forfeited. The same principle was held applicable to rent deposited in advance to be set off against the last month's rent of a tenancy created by a non-notarial agreement. *Vil Mohamed v. Chogla*.[2] But no case can be cited to support the contention that where the purchase money is in the hands of the vendor who is the debtor of the vendee, the amount so due can be treated as a deposit liable to be forfeited. It may be otherwise if there had been an express agreement that the debt due should be held as a deposit with the express or implied liability to forfeiture in case the sale goes off owing to the fault of the purchaser.

There are certain special rules which apply to deposits made on an agreement to sell. Fry L.J. in *How v. Smith*[3] points out that a deposit of this nature is the same as the " *arraha* " or " earnest " of the Roman law.

> " From the Roman law," he says " the principles relating to the earnest appeared to have passed to the early jurisprudence in England."

Then citing a passage from Bracton, he continues :—

> " Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the earnest is lost by the party who fails to perform the contract . . . . Taking these early authorities into consideration, I think we may conclude that the deposit in the present case is the earnest or ' *arraha* ' of our earlier writers."

[1] *(1917) 20 N. L. R. 1.* [2] *(1920) 2 L. R.R. 160.*
[3] *(1884) 27 Ch. Div. 89, at p. 102.*

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See the recent case of *Chillingworth v. Esche.*[1] The Roman-Dutch law adopted the Roman law with regard to "*arraha.*" As *Voet* (*18, 1, 25*) says :—

> "An '*arraha*' is often what has been given as a token of a purchase contracted and completed and to be implemented afterwards on both sides, in order that it may be the more clearly proved that the price had been agreed upon, but sometimes, however, as proof of an inchoate purchase to be further perfected in writing or otherwise according to the intention of the parties. In the latter case, the inchoate purchase may be receded from at the loss to the one party of the '*arraha*' he has given, or on restitution by the other of double the amount which he has received."

Money of the purchaser lying in the hands of the vendor and not given as a deposit or agreed to be treated as a deposit cannot be regarded as a deposit, "earnest," or "*arraha*" given on the occasion of an agreement to purchase being entered into. In the circumstances the principle laid down in *Nagur Pitche v. Usoof* (*supra*) can have no application to the case. The appeal fails on all points, and must be dismissed, with costs.

At the same time one cannot help feeling that the case has been decided on unsatisfactory material. It would have been better if the defendant had suggested the issues which from his point of view raise the real questions in dispute between the parties and had asked for an opportunity to lead evidence in support of his defence. He was content to go to trial on the two issues framed and must take the consequences. The plaintiff is, however, not entitled to execute his judgment in the previous action, No. 29,065, until he has discussed the property of the intestate in the present action, and then only for any balance still remaining due. The District Judge might see that an entry to this affect is made in D. C. No. 29,065. The appeal is dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

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[1] (*1923*) *I Ch. 576*; *see* (*1924*) *I Ch. 97.*