1919.

[FULL BENCH.]

Present : De Sampayo J., Schneider A.J., and Loos A.J.

JAYAWARDENA *v.* RAHAIMAN LEBBE.

114—C. R. Gampola, 3,539.

Promissory note payable on demand — Payment — Negotiation after payment—Bills of Exchange Act, ss. 36 (1) *and* 59 (1).

When a promissory note payable on demand is paid by the maker, it ceases to be a note. Negotiation after the date of payment does not give any right to the endorsee to sue on it.

THE facts are set out in the judgment.

Bartholomeusz, for plaintiff, appellant.—If the law be as laid down in *Tenna v. Balaya,*[1] it would seriously affect the negotiability of promissory notes. Then payment unknown to the endorsee would be a defence. It is the duty of the holder to deliver the bill when he is paid (section 52 (4), Bills of Exchange Act, 1882). When the maker does not get it back, he must suffer the consequences.

Section 31 (1) enacts that a paid bill is not negotiable. But if a third party takes a bill not overdue without any notice of any defect in the title, he is a holder in due course (section 29), and acquires all rights under section 38.

[DE SAMPAYO J.—The bill will no longer be a bill, but mere waste paper. (*Chalmers' Bills of Exchange Act, note to section 36 (1), 6th edition, p. 120.*)]

That passage is not a part of the Act. A holder in due course is not affected by any defect of title or defences available to prior parties (section 38 (2)). Want of title is only a defect of title.

[1] *(1908) 12 N. L. R. 27.*

In *Marikar v. Carolis* [1] Perera J. differs from the decision of *Tenna v. Balaya.*[2] In *Tenna v. Balaya* [2] the rights of a holder in due course were not considered.

Counsel also cited *Silva v. Wijesekera* [3] *and (1873) L. R. 8 Q. B. 380.*

A St. V. Jayawardene, for defendant, respondent.—The note was overdue, because it had been paid at the time of the endorsement. After payment a note is dead for all purposes. A note payable on demand is always mature, and if paid at maturity, it ceases to be negotiable. It is not a defect, but renders the note a nullity (section 36 (1)). (*9 Barnwell & Cresswell 130, 1 Parry & Davidson 207.*) Payment before maturity would not be payment in due course (*3 Camp. 93*). In *Marikar v. Carolis* [1] the question of payment was not considered. In this case the endorsee can proceed against Mr. Phillips.

Counsel also cited *7 M. & W. 174, (1854) L. J. 20 Q. B. 261,* and *2 Hals. 549.*

Cur. adv. vult.

October 15, 1919. DE SAMPAYO J.—

This case has been referred by my learned colleagues to a Bench of three Judges for the decision of a point of law. This is an action on a promissory note for Rs. 200, payable on demand made by the defendant on March 18, 1916, in favour of one J. D. Phillips, and endorsed by the latter to the plaintiff. It is agreed that the defendant paid or satisfied the amount of the note on August 24, 1916, while it was still held by Phillips. But it appears that Phillips, who retained the note fraudulently, endorsed it to the plaintiff on September 18, 1917. The question for decision is whether, on the footing that the plaintiff had no notice of the previous payment and gave consideration for the endorsement to him, the defendant is liable to the plaintiff on the note.

Section 36 (1) of the Bills of Exchange Act declares that " where a bill is negotiable in its origin, it continues to be negotiable until it has been restrictively endorsed or discharged by payment. " Payment for this purpose means payment by the acceptor or maker to the holder at or after maturity. Section 59 (1) of the Bills of Exchange Act. In the case of a promissory note payable on demand, the maker is at liberty to pay it at any time after its date. The defendant duly paid and discharged the note in suit while it was held by Phillips. Could Phillips thereafter validly negotiate the note so as to give the plaintiff a right of action against the defendant? In *Tenna v. Balaya* [2] it was held by Wendt J., in view of section 36 (1) of the Bills of Exchange Act, that a promissory note payable on demand ceased to be negotiable after payment by the maker, and that an endorsee who took it after such payment had no right to sue on it.

[1] *(1913) 17 N. L. R. 89.*

[2] *(1908) 11 N. L. R. 27.*

[3] *1 C. W. R. 42.*

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I think that this is a right decision, and that the subsequent case of *Marikar v. Carolis* [1] is not really in conflict with it. In the latter case the Court was concerned with the question as to when a promissory note payable on demand can be regarded as having become overdue so as to affect an endorse with defects of title, of which he had no notice; and with regard to *Tenna v. Balaya* (*supra*), Pereira J., who delivered the judgment of the Court, remarked: " If that decision is to be deemed as implying that a promissory note payable on demand is always to be regarded as an overdue note so far as the matter of negotiation is concerned, I am not, as at present advised, inclined to endorse it. " He himself did not think that *Tenna v. Balaya* involved that proposition, for he added: " I am not sure that the learned Judge who decided that case intended to go so far. " This remark is quite just, for *Tenna v. Balaya* was not made to turn on any question of the note being " overdue." Section 86 (2) of the Act, to which reference was made, safeguards an endorsee of a promissory note payable on demand against defects of title, though he takes it after a reasonable time for presenting it for payment has elapsed since its issue. The expression " defects of title " is an equivalent of " equities attaching to the bill." But payment of the bill as distinguished from a part payment is not a mere equity. Section 29 (2) enumerates the defects of title, and *Chalmers' Bills of Exchange* (*6th edition*) *119*, while saying that the list there given may not be exhaustive, states that a person whose title is defective must be distinguished from a person who has no title at all, and who can give none. As regards the effect of payment by the maker or acceptor, Wendt J. in *Tenna v Balaya* cited the following passage from *Chalmers 120*: " Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect; they are rather grounds of nullity. That which purports to be a bill is no longer such; it is a mere waste paper." Again, Chalmers, at page 202, in a note on section 59 and following sections of the Act on the subject of discharges, says: " A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument." In the present instance, when the defendant paid Phillips, all rights of action on the note were extinguished and the note was discharged, and even if the plaintiff had no notice of the fact and was a holder in due course he acquired no right of action on the note against the defendant. See also *Byles on Bills 298* (*15th edition*), where it is stated: " The payment of a note payable on demand will be a defence, even against an endorsee for value without notice; for the Statute which imperatively prohibits the re-issuing of such a note dispenses with notice." In *Smith's Mercantile Law, vol. 1, p. 254* (*10th*

[1] *(1913) 17 N. L. R. 89.*

edition), the following passage occurs: " Though a bill or note is generally negotiable after it has become due, yet it is not so after it has once been paid at maturity, if such negotiation would have the effect of charging persons who otherwise would be discharged." These comments of the text writers are not only such as necessarily flow from the provisions of the Statute itself, but are founded on judicial authority. In *Burbridge v. Manners* [1] Lord Ellenborough said that a bill paid at maturity could not be re-issued, and no action could afterwards be maintained upon it by a subsequent endorsee. See also *Bartrum v. Caddy;*[2] *Freakley v. Fox;*[3] *Burchfield v. Moore.*[4]

I think it must be held, as a matter of law, that the plaintiff cannot maintain this action against the defendant on the promissory note which had, previous to the endorsement to him by the payee, been satisfied and discharged by the defendant. An argument as to hardship was addressed to us, but whatever the consequences may be, the law must prevail. It is only necessary to add on this point that there is nothing to prevent the plaintiff from enforcing his remedy against his immediate endorser Phillips.

In my opinion the judgment under appeal is right, and the appeal should be dismissed, with costs.

Schneider A.J.—

There is nothing I can usefully add to my brother De Sampayo's judgment, with which I entirely agree. The language of sections 36 (1) and 59 (1) of the Bills of Exchange Act leaves no room for any other construction than that the payment of a bill or promissory note in due course discharges it, so that it is no more a mere piece of waste paper after such payment.

Loos A.J.—

When this case came up before me, I was inclined to think that the case of *Marikar v. Carolis,*[5] which had been decided by a Bench of two Judges, was in conflict with the decision of Wendt J. in the case of *Tenna v. Balaya,*[6] but I entertain some doubt on that point now.

The point of law raised in this case has been very fully argued before us, and I entirely agree with the judgments of my brothers De Sampayo and Schneider that the language of sections 36 (1) and 59 (1) of the Bills of Exchange Act necessitates the dismissal of this appeal.

Appeal dismissed.

[1] *(1812) 3 Camp. 193.*
[2] *(1838) 1 Per. & Dav. 207.*
[3] *(1829) 9 B. & C. 130.*
[4] *(1854) 23 1 J.& Q. B. 261.*
[5] *(1913) 17 N. L. R. 89.*
[6] *(1908) 11 N. L. R. 27.*