1913.

Present: Pereira J. and Ennis J.

PALANIAPPA CHETTY *v.* DE MEL.

36—D. C. Colombo, 34,937.

Contracts "relating to" promissory notes are governed by the English law, and not by the Roman-Dutch law—Letter from A to B asking him to pay C Rs. 1,000 and guaranteeing to pay the sum if not paid by C—Benefit of excussion.

The test for the determination of the question whether a contract "relates" to a promissory note, and is therefore governed by the English law in terms of section 2 of Ordinance No. 5 of 1852, is in the question whether the rights and liabilities of the party to the contract sought to be made liable thereunder are in any way affected by the terms of the note to which it is alleged to relate, or whether such rights and liabilities can be affected by the possible legal situations incidental to the effect and operation of the note. And so where A wrote to B as follows: "Please give C Rs. 1,000 at a reasonable interest on a promissory note for one month. I can recommend him highly. If he did not pay, I guarantee the payment."

Held, that the contract so established was a contract "relating to" the promissory note taken on the strength of A's letter, and that the English law applied to it, and A became liable to be sued as surety before the excussion of the principal debtor.

THE facts are set out in the judgment of the Additional District Judge:—

The only question in this action is whether the defendant by document P 1 rendered himself liable as a principal debtor, or whether he duly rendered himself liable as surety.

The document is as follows: "Please give bearer, Mr. Thomas de Almeida of ......, Rupees One thousand on a pro-note for one month. I can recommend him highly. If he did not pay, I guarantee the payment.

JACOB DE MEL."

It is addressed to the plaintiff, who lent Almeida Rs. 1,000 on a promissory note dated June 14, 1912, payable at the Bank of Madras on July 10, 1912.

The note was dishonoured for non-payment on July 13, and the amount is still admittedly due to plaintiff.

The defendant contends that the document P 1 only rendered him liable as a surety, and that he cannot be proceeded against until the principal has been excussed.

I am of opinion that the defendant only rendered himself liable as surety, and that the issue framed must be answered in the negative.

Plaintiff's counsel contended that the action should not be dismissed, even though the issue was answered in defendant's favour, but that the action should be allowed to stand over till plaintiff had proceeded against Almeida.

I am not prepared to accede to this contention.

It would be unreasonable to have the action hanging over plaintiff indefinitely, and it may be that there might not be any necessity for plaintiff to sue the defendant. It is also possible that the defendant may have other defences to set up after Almeida has been sued.

I therefore dismiss plaintiff's action with costs.

A St. V. Jayewardene, for plaintiff, appellant.—The English law governs the rights of parties, and not the Roman-Dutch law. Section 2 of Ordinance No. 5 of 1852 introduces the English law on all matters relating to promissory notes. This is a contract relating to a promissory note. Under the English law a surety may be sued before the principal debtor. The defendant cannot, therefore, plead the benefit of excussion.

Hayley (with him *Canekeratne*), for defendant, respondent.—The Roman-Dutch law applies to this case. Section 2 of Ordinance No. 5 of 1852 applies only to actions "arising on or upon a bill of exchange." Here the action does not arise on the promissory note. It arises on the guaranty. It makes no difference that the guaranty was given to cover a loan on a promissory note. The defendant is liable to no one except the plaintiff—the payee of the note. If the note is circulated, the defendant would not be liable to any holder of the note. That shows that the defendant's obligation arises from the guaranty and not from the note. Counsel cited *Lipton v. Buchanan,*[1] *Raman Chetty v. Silva.*[2]

Cur. adv. vult.

March 6, 1913. PEREIRA J.—

In this case the plaintiff seeks to render the defendant liable to pay him the amount sued for on the footing of document P 1. That document was granted by the defendant to the plaintiff, and is as follows: "Please give bearer, Mr. Thomas de Almeida of Wennapuwa, Rs. 1,000 at reasonable interest on a promissory note for one month. I can recommend him highly. If he did not pay, I guarantee the payment." In compliance with the request contained in the document the plaintiff lent Almeida Rs. 1,000 on his promissory note P 2. Almeida failed to pay the plaintiff the amount of the note on its due date, and hence the plaintiff sues the defendant for the recovery of that amount on the footing of his guarantee contained in document P 1. The question is whether the liability of the defendant on P 1 is governed by the English law or the Roman-Dutch. Under the Roman-Dutch law the defendant

[1] *(1914) 8 N. L. R. 49.* [2] *(1912) 15 N. L. R. 286.*

would be entitled to the *beneficium divisionis sen excussionis*, that is to say, he would be entitled to compel the plaintiff, before exacting payment from him, to excuss the principal debtor (Almeida), that is, sue him and take out execution against his property; but under the English law a surety may be sued before the excussion of the principal debtor. Equity affords relief in certain circumstances, but such circumstances have presumably no place in the present case. Now, section 2 of Ordinance No. 5 of 1852 provides that the law to be administered in this Colony in respect of all contracts and questions arising upon or relating to bills of exchange, promissory notes, and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period if the contract had been entered into, or if the act in respect of which any such question shall have arisen had been done in England. These words are clearly intended to have a very wide operation, and the question in the present case is whether the contract on document P 1 can be said to be a " contract relating to a promissory note." If it is, the English law would apply. Now, a contract having a mere physical connection, so to say, with a promissory note would hardly fall under the class of contracts contemplated by the Ordinance, as, for instance, a contract providing for the safe custody somewhere of a promissory note. The test in a case like the present appears to me to be in the question whether the defendant's rights and liabilities are in any way affected by the terms of the promissory note granted by Almeida, or whether such rights and liabilities can be affected by the possible legal situations incidental to the effect and operation of the promissory note. It is clear that the due date of payment of the money, and hence of the accrual of the defendant's responsibility, is to be sought for in the light of the law relating to promissory notes, and if the note in question in this case be indorsed, the defendant's liability would arise on the failure of Almeida to pay the indorsee, and on the plaintiff being obliged to pay the indorsee as a result of such default. And so on, in a variety of ways, the defendant's liabilities may conceivably be affected by matters incidental to the note.

I therefore think that the defendant's contract P 1 may legitimately be said to be a contract " relating to " the promissory note in question. I would set aside the judgment appealed from and enter judgment for the plaintiff as claimed with costs.

ENNIS J.—

It is conceded in this case that if English law applies the appeal must be allowed. Ordinance No. 5 of 1852, section 2, says: " The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to .... promissory notes .... , and in respect of

all matters concerning any such instruments, shall be the same in respect of the said matters as would be administered in England ...."

The action in this case was on the following document: " Please give bearer, Mr. Thomas de Almeida of Wennapuwa, Rs. 1,000 at reasonable interest on a promissory note for one month. I can recommend him highly. If he did not pay, I guarantee the payment." The plaintiff advanced Rs. 1,000 to Mr. Thomas de Almeida on a promissory note on the guarantee of the defendant in this document, and the promissory note was dishonoured for non-payment. This document appears to me to be a contract relating to a promissory note. It is operative on the money being advanced on a promissory note, and liability under it is contingent on non-payment of the promissory note at maturity.

In my opinion it is a matter falling within the scope of section 2 of the Ordinance No. 5 of 1852, and English law applies. I would allow the appeal with costs, and give judgment for the plaintiff for the amount claimed with costs.

Appeal allowed.