1943 *Present :* **Soertsz S.P.J. and Keuneman J.**

PALIAMAPPAR CHETTIAR, Appellant, *and* AMARASENA, Respondent.

106—D. C. Galle, 38,927.

Pawn—Action to recover amount lent—No necessity to tender pawn or pledge—Roman-Dutch law—Pawnbrokers Ordinance (Cap. 75), ss. 3 and 4.

It is not the necessary condition of the right of a pawnee or pledgee to recover the amount lent by him that he should tender the pawn or pledge.

A contract of pawn or pledge which comes within the provisions of the Pawnbrokers Ordinance would be governed not solely by the provisions of the Ordinance but by those provisions to the extent to which they modify the Roman-Dutch law.

APPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him *Ivor Misso*), for plaintiff, appellant.

G. P. J. Kurukulasuriya (with him *H. W. Jayewardene*), for defendant, respondent.

Cur. adv. vult.

[1] *L. R. (1935) 2 K. B. D. 209 at 215 et seq.*

April 21, 1943. SOERTSZ S.P.J.—

The plaintiff, a licensed pawnbroker, says that, on July 21, 1941, the defendant borrowed from him Rs. 850, giving him certain articles of jewellery in pawn, and that similarly, he borrowed Rs. 225 on August 30, 1941, and on both these transactions, he seeks to recover from the defendant the amount stated in the plaint together with interest and costs.

The defendant's answer to this claim is threefold. He says :

(*a*) That he pawned the articles and received the sums of money claimed for and on behalf of one Suppiah ; that he delivered both sums to Suppiah ; and that the plaintiff has, therefore, no cause of action against him, and should sue Suppiah. The defendant does not, however, say that he disclosed to the plaintiff or that the plaintiff knew that the defendant was acting for Suppiah.

(*b*) That the plaintiff being a licensed pawnbroker is limited to such relief as he may be able to obtain under the provisions of the Pawnbrokers Ordinance.

(*c*) That the plaintiff is not entitled to sue him " without tendering . . . . the articles in question as a condition precedent to his recalling the amounts . . . . or until the alleged thief is prosecuted to conviction and the articles pawned are by an order of Court . . . delivered to some claimant other than the plaintiff ".

Regarding this last averment, it is undisputed that the articles pawned with the plaintiff have been taken from him by the Police and given to the custody of the Court in connection with a charge of theft made by one third party against another third party in respect of those articles.

The learned District Judge held with the defendant on the third point taken by him, and dismissed the plaintiff's action with costs.

On appeal, only questions (*b*) and (*c*) were discussed. Question (*a*) was, obviously, untenable, and so, in my opinion, is question (*b*), too, although it was pressed. In view of sections 3 and 4 of the Pawnbrokers Ordinance, the provisions of that Ordinance certainly cannot apply to the transaction of July 21, 1941, which involved a sum over Rs. 500. So far as the later transaction is concerned, it is within that Ordinance, but it would be governed not solely by those provisions, but by them to the extent to which they modify the common law.

The only question, then, left for consideration is question (*c*), and that question is not dealt with by the Ordinance. The answer to it must be sought under the Roman-Dutch law as it commonly obtains here. An examination of that law, as expounded by the accepted authorities, and of such case law as we have in our reports, leads one clearly to the conclusion that in the absence of any special agreement, for a pawnee or pledgee to sue to recover the amount lent by him on the security of a pawn or pledge, it is not a necessary condition that he should tender the pawn or the pledge. In a transaction of that kind, there are, really, two contracts, one ancillary to the other. As *Maasdorp* says, on the authority of *Voet 20.1.18* :—

" The contract of mortgage (or pledge) is in its very nature accessory only, and pre-supposes the existence of some other valid principal

obligation, in security of which the mortgage (or pledge) contract is entered into and the mortgage (or pledge) itself granted, and without which neither of these latter can exist" (Book 2, 2nd Ed., p. 240).

It follows from this that the pawnee or pledgee may sue on the principal contract of loan disregarding the security he holds, for there is nothing in law to prevent a person waiving a benefit that he has. It is no answer to such a claim in the absence of a special agreement, that the pawnee or pledgee holds a pawn or pledge, in satisfaction of his claim. The pawner's or pledger's course of action must be to discharge his obligation on the principal contract, and then seek to recover what is due to him on the accessory contract, or damages in default. He may, of course, do this *uno ictu*, tendering the money due by him and asking for the return of the thing pledged or pawned, or its value, or damages. The plaintiff has not taken that course, and his present defence fails completely.

There was much discussion in the course of the hearing of this appeal in regard to the liability of the plaintiff to the defendant in view of the admitted fact that the articles pledged or pawned have gone out of his possession. The law appears to be that a person in the position of the plaintiff, here, would be excused if the loss of possession of the articles is due to either *vis major*, or *casus fortuitus*, or robbery or theft without his being to blame in that regard. *Seyadoe Ibrahim v. Cogan* [1], *Wapochie v. Marikar* [2], *Santia Kaithan v. Assan Umma* [3]. The plaintiff's loss of possession was submitted to us as one coming under *vis major*. But it is a question whether a pawnbroker who in ignorance of his right to hold even stolen property pawned with him against the owner himself till he is paid the amount due to him (see *Walter Pereira, p. 293* based on *Grotius 2-3-5-6*), and in ignorance of the powers of the Police as limited by section 30 of the Pawnbrokers' Ordinance, surrenders the pawn, is entitled to plead *vis major*. But that question does not arise here, for the defendant before us seeks to repel the claim made against him with the simple plea that he is not liable to pay or tender the money due because the articles pledged have not been tendered to him. That plea, as I have already observed, cannot succeed. The defendant's cause of action on the accessory contract arises only on his paying or tendering the amount due.

For these reasons, I would set aside the judgment of the learned District Judge and enter judgment for the plaintiff as prayed for with costs here and below.

KEUNEMAN J.—I agree.

Appeal allowed.

[1] *(1857) Lorenz's report, Pt. II., p. 114.* [2] *(1859) Joseph's and Beven's reports p. 31*
[3] *3 S. C. C. 98 ; Burge, Vol. 3, p. 588.*