1918.

*Present*: Bertram C.J. and De Sampayo J.

VALLIAPPA CHETTY *v.* SILVA.

*124—D. C. Galle, 15,588.*

*Promissory note—Material alteration—Note a nullity—May note be read in evidence on an action for money lent ?*

"A Court of Appeal ought only to decide in favour of an appellant on a ground put forward for the first time (in appeal), if it be satisfied beyond doubt that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial.

*Obiter.*—The effect of material alteration of a promissory note is to make the note absolutely void. Though the note is a nullity, it can be used as evidence in support of a claim put in some other way.

THE facts are set out in the judgment of Bertram C.J.

*J. S. Jayawardene*, for the defendant, appellant.

*A. St. V. Jayawardene*, for the plaintiff, respondent.

July 1, 1918. Bertram C.J.—

In this case we have first to consider the findings of fact of the learned District Judge. They are, perhaps, not so clear and explicit as they might be. The learned Judge had at first to consider the case of the parties with regard to the payment. He heard the evidence of both sides, and he rejected the evidence of the defendant. He then had to consider the question of the amount of the interest. The plaintiff has sworn that the amount of the interest was 18 per cent., and that this amount was filled in when the note was signed. The defendant said that it was 12 per cent., and that the figure 18 was filled in after the note was signed. The learned Judge had, therefore, to consider whether the amount of the interest was filled in at all, or whether the note was left blank. On that question he rejected the evidence of the plaintiff. He was, therefore, in this position. He had rejected the evidence of the defendant on the question of payment. He had rejected the evidence of the plaintiff on the question whether the note was a blank note. He then had to apply his mind in this state of affairs to the conflict of evidence as to the amount of the interest, and he speaks as though, under those circumstances, he was logically bound to accept the account given by the defendant. He says, "that being so,

the rate must be taken as the defendant states, namely, 12. " I do not wholly follow that reasoning. But I will take it as a finding of fact on the conflict of evidence between the plaintiff and the defendant, and as meaning that the learned Judge accepts the evidence of the defendant.

The point there taken was a point purely as to the amount of interest. It was a side issue. It was a question which was not very fully or strenuously fought by the defendant, nor very elaborately considered by the learned Judge. But now in this Court, for the first time, the appellant takes a new point. It is entirely new, because a perusal of the record shows that it had not occurred to the defendant in the whole history of the case—neither in the affidavit asking leave to defend, nor in the pleadings, nor in the argument. It is here contended that the finding of fact of the learned Judge that the rate of interest agreed upon was 12 and not 18, and that the note had been filled up, after signature, with a figure which was in excess of the agreed figure, voids the whole note, and that, therefore, the plaintiff cannot even recover the amount which the learned Judge on his previous finding in the case had found to be due.

The question is, Can this point be taken at this stage of the case? In the case of *The Tasmania*,[1] the House of Lords declined to go into a point taken in the Court of Appeal, which had not been taken in the Court below. Lord Herschell said: " The conduct of a cause at a trial is governed by, and the questions asked of the witnesses are directed to, the point then suggested, and it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that, in these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial. "

Well, now, it is true that there was an issue raised as to the amount of the interest agreed upon. It is true that that was before the Court, and that the parties ought to have put forward their whole case on that point. But that point was before the Court, as I have said, as a side issue. There is no question that, if it had been raised on the pleadings, and if an issue had been formulated, it would have been much more seriously considered, both by the parties and by the Judge. What is more, if the point as to the effect of the alleged alteration had been then raised, there is no question that the plaintiff would have asked leave to supplement his pleadings by claiming the amount due apart from the promissory note, and there is no question on the English decisions that, if he had been given the opportunity

[1] *(1890) L. R. A. C. 223.*

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then, even though the note was void by the alteration, he could have used the note as evidence of what used to be called the "money count." On that point, if authority is needed, it will be found in the case of *Master v. Miller* [1] and the cases there cited, in particular the case of *Sutton v. Toomer.*[2]

Under those circumstances, it appears to me that the principles laid down by the House of Lords in *The Tasmania*[3] in substance apply. The facts bearing upon the new contention are not as completely before the Court as they would have been if the controversy had arisen in the District Court, and, therefore, I think the appellant should not be allowed to take the point now.

The only consideration urged to the contrary is this, that the effect of the alteration of the note is to make the note absolutely void. I am disposed myself, although it is not necessary to decide the point, to take that view of the law. Section 64 of the Bills of Exchange Act, 1882, was intended to codify the law as it was laid down in the case of *Master v. Miller.*[1] It uses the word "avoids," and the same word is used in that case, and the Judges in that case definitely declared that any material alteration in an instrument, whether a deed or a promissory note, makes it a nullity as a deed or a promissory note, although it appears from later authorities that though the instrument is a nullity in that capacity, it can be used as evidence in support of the claim, if the claim can be put in some other way. The question is, Does the fact that for this purpose the promissory note is a nullity enable the appellant to raise a point in this Court which he could not have raised under ordinary circumstances? I do not think that there is any magic in the fact that the document was a nullity. The principles I have above explained apply, whether the document in question is void, or whether it is only voidable. In my opinion, therefore, the appeal should be dismissed with costs.

DE SAMPAYO J.—

I am of the same opinion. Counsel for the appellant cited the case of *Wijewardene v. Appu* [4] in support of his argument. But it will be found that in that case the point was expressly raised, and an issue was stated in the District Court, not only as to the alteration of the promissory note, but as to the right of the plaintiff to sue on it if there was such an alteration. This Court, moreover, upheld the objection, without making any order as to costs. I, therefore, think that the case cited does not help the appellant in this case.

*Appeal dismissed.*

[1] *Smith's Leading Cases, Vol. 1, 808.*
[2] *(1827) 7 B. & C. 416.*
[3] *(1890) L. R. A. C. 223.*
[4] *(1915) 18 N. L. R. 318.*