1934 *Present:* Macdonell C.J. and Drieberg J.

MARSHALL *v.* SENEVIRATNE.

263—D. C. Colombo, 47,531.

Power of attorney—Authority to recover and receive debt—no right to delegate authority—Letter to proctor to recover money—No authority to receive—Action on mortgage bond—Payment by defendant to proctor—Fraud of proctor—who should bear the loss?

Plaintiff, a primary mortgagee, authorized the holder of his power of attorney to call in from the first defendant, the mortgagor, the money due on the mortgage bond and the attorney gave instructions to a proctor to rcover the money.

The proctor, having a client, the fourth defendant, willing to leave money with him for investment took from that client certain moneys, not quite sufficient to pay off plaintiff's mortgage, and induced the first and second defendants to execute a mortgage bond securing the same properties contained in the plaintiff's mortgage, the first and second defendants believing that the full amount thereof would be paid over to the plaintiff in discharge of his claim. The proctor later paid to the plaintiff's attorney moneys amounting to half the sum due on the bond but not any part of the balance and he could not obtain a discharge of the plaintiff's bond.

The proctor became insolvent and it was discovered that he had embezzled the money paid to him by the fourth defendant. It was in evidence also that the attorney had written a letter to the proctor in the following terms: "Should the loan be not repaid by the due date, please take steps to recover it".

Held (in an action brought by the plaintiff to recover the balance due on the mortgage), that the proctor had no authority to receive money on behalf of the plaintiff so as to constitute the payment to the proctor, a payment to the plaintiff.

Where a power of attorney authorized a person to ask, demand, sue for, recover, and receive all debts owing to the grantor, the attorney has no power to delegate his authority to another.

An authority to delegate may be implied only where the act to be done was purely ministerial and did not involve any confidence or discretion.

Where a party is aware that he is dealing with an agent under a power of attorney, he acts at his peril in not knowing the extent and limit of the agent's power.

THE plaintiff brought this action, through his attorney, on a mortgage bond No. 4,949 of May 24, 1928, executed in his favour by the first defendant to secure a sum of Rs. 70,000 lent to him. The plaintiff alleged that first defendant had repaid Rs. 35,000 and claimed a sum of Rs. 37,483.36, balance principal and interest. By deed No. 5,079 of February 21, 1929, first defendant transferred the lands mortgaged to his wife the second defendant. The first defendant and his wife by bond 1 D 6 executed on October 15 and 23 mortgaged the lands to the fourth defendant.

The first defendant pleaded that the plaintiff received payment as a result of the execution by him of the bond 1 D 6 in favour of the fourth defendant. It was alleged that on the suggestion of de Vos, a proctor

and notary employed by plaintiff's attorney, the first defendant executed bond 1 D 6 for Rs. 70,000 the arrangement being that de Vos should pay the money to plaintiff's attorney and his bond to the plaintiff discharged. It was contended on his behalf that de Vos had sufficient authority to receive the money and that the attorney had power to authorize de Vos to receive payment.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera (with him *de Zoysa, K.C., D. W. Fernando, and D. S. Senanayake*), for first and second defendants, appellants.—The attorney's letter to de Vos dated September 24, 1934, authorized de Vos to receive money in payment of the amount due on plaintiff's bond No. 4,949. The words in that letter, " should this loan not be repaid by due date, please take the necessary steps to recover the principal with interest" tacitly implied an authority to de Vos to receive the money should it be brought to him. The words, properly interpreted, mean this ; " the money has not been repaid to me, Boake, and if by the 25th September it is not repaid to you, de Vos, please take the necessary steps to recover it and obtain payment of it ". The first and second defendants authorized de Vos to raise the money for payment of the amount due under bond No. 4,949 by a mortgage of the property to Mrs. Poulier, the fourth defendant. Poulier's bond was executed on October 23, 1923, and a sum of Rs. 60,000 was paid by Mrs. Poulier to de Vos on October 8. Therefore, on October 23, by executing the Poulier bond the first and second defendants released the Rs. 60,000 in de Vos' hands for payment to plaintiff. The money in the hands of de Vos operated as a payment to plaintiff by virtue of the authority given to de Vos by Boake, the plaintiff's attorney, in the letter dated September 24, 1934.

Authority given to a solicitor or proctor to recover a debt gives him an implied authority to receive payment of that debt (*Yates v. Freckleton*[1]). Here de Vos, a proctor, was given authority by the plaintiff's attorney, Boake, " to take necessary steps to recover the principal with interest ". That authority gives de Vos the implied authority to receive payment of the principal and interest. If after payment the money is misappropriated by de Vos the loss must fall on the plaintiff.

A. E. Keuneman (with him *H. E. Garvin*), for plaintiff, respondent.—The authority given by the letter of September 24 is merely to take the necessary steps to recover the debt, *i.e.*, to institute an action for its recovery. Such an authority does not give an implied authority to receive payment of the debt. It may be that if an action is instituted the proctor authorized to institute the action has implied authority to receive payment of the debt for the recovery of which the action is instituted. Here no action has been instituted and there is no evidence to show that a proxy had been signed by Boake in favour of de Vos. In our Courts a duly signed proxy is necessary before an action can be instituted by a proctor on behalf of a client. Even if the letter of September 24 is interpreted to be an authority to receive payment of the debt due to the plaintiff, that authority is bad because Boake, the writer of the letter, was bound by the terms of the power of attorney

[1] *2 Doug. 623; 99 E. R. 394.*

in his favour. The power of attorney by the plaintiff in Boake's favour authorized only Boake to receive payment of money due to the plaintiff. Boake had therefore no power to delegate his duty to another. An attorney may be entitled to delegate purely ministerial acts, but he cannot delegate his duties unless expressly authorized by the power of attorney to do so. Powers of attorney must be strictly construed, (*Bryant, Powis, and Bryant v. La Banque du Peuple*[1]). The first defendant in this case was bound, at his peril, to inquire into Boake's authority before he paid the money to de Vos. (*Bryant, Powis, and Bryant v. La Banque du Peuple* (*supra*).) He would be in the same position as if the power of attorney had been perused. (*Jonmenjoy Coondoo v. Watson*[2]).

It was argued by the other side that on October 23 when the bond in favour of Poulier was executed the Rs. 60,000 in the hands of de Vos operated as a payment to plaintiff. There is no evidence to show that de Vos had Rs. 60,000 in his hands on that day; the onus of proving that was on the first and second defendants and they have failed to discharge that onus.

Implied authority to receive the principal due under a mortgage is not easily presumed. A solicitor who has authority to receive interest for a mortgagee either by reason of the mortgagee's conduct or by express direction has no implied authority to receive the principal debt due on the mortgage. (*Wilkinson v. Candlish*[3]; *Kend v. Thomas*[4]; *Bonham v. Maycock*[5].)

H. V. Perera, in reply.—Where there is no express power of delegation an attorney has an implied power to delegate acts purely ministerial and not involving the exercise of discretion. Boake was given power "to ask, demand, sue for, recover, and receive all debts . . . ." He may not be entitled to delegate these powers because they involve the exercise of discretion, but once he has exercised his discretion and "asked for" or "demanded" the payment of a debt he is entitled to delegate the purely ministerial act of receiving the debt "asked for" or "demanded". Receiving payment of money is purely a ministerial act. (*Hemming v. Hale*[6].)

All that the defendants were required to prove was the receipt of the money by de Vos. They had not to go further and prove that at the date of the execution of the bond the money was in the hands of de Vos. If the plaintiff relied on the fact that at the date of the Poulier bond de Vos did not have the Rs. 60,000 in his hands, then the onus of proving that fact was on the plaintiff.

Cur. adv. vult.

February 8, 1935. MACDONELL C.J.—

This is a case where innocent parties must suffer for the fraud of a third party, and the only question is, which innocent parties.

The gist of the case is that plaintiff, a primary mortgagee, instructed the holder of his power of attorney to call in from first defendant, the mortgagor, the money due on the mortgage bond; and that the attorney gave instructions to a proctor to recover the money. The proctor having

[1] (1893) *A. C. at p. 177.*
[2] *9 A. C. at p. 566.*
[3] *5 Ex. 91, 155 E. R. 39.*
[4] *1 H. & N. 472, 156 E. R. 1287.*
[5] *188 L. T. 736.*
[6] *7 C. B. (N. S.) 487; 29 L. J. C. P. 137.*

a client, fourth defendant, willing to deposit money with him for investment, took from that client moneys not quite sufficient to pay off plaintiff's mortgage and a few days later allowed first and second defendants to execute a mortgage bond for the same properties contained in the plaintiff's mortgage in favour of fourth defendant for the full amount of plaintiff's mortgage, the first and second defendants believing that the full amount thereof would be paid over to plaintiff, and his claim thereby satisfied and his bond discharged. The mortgage bond they executed to fourth defendant was drawn as a primary bond. The proctor later on paid over to plaintiff's attorney moneys amounting to half the sum due on plaintiff's bond but not any part of the balance, and did not, since he could not, obtain a discharge of plaintiff's mortgage bond. The proctor went insolvent and then these facts were discovered, also that he had embezzled large sums due to his clients, fourth defendant among them. The questions that arise are: Was plaintiff's mortagage bond discharged by or to the extent of fourth defendant's payments, and, did the proctor receive fourth defendant's money on behalf of the plaintiff, and if he did. Had he power so to receive it that payment to him was payment to the plaintiff ?

After this outline it is well to give the facts in fuller detail. The plaintiff not being resident in the Island, had invested some money in mortgages here, and in 1928 the first defendant was indebted to him in the sum of Rs. 70,000 on a mortgage bond No. 4,949 dated May 24, 1928, carrying interest at 7 per cent. but if not paid punctually, then at 10 per cent. The plaintiff, by reason of his absence from the Island, had granted a power of attorney to one Mr. Lyons whom failing by absence or otherwise, to one Mr. Boake whom failing by absence or otherwise, to one Mr. Aikman Smith. In actual fact the attorney who did the necessary work for the plaintiff seems to have been Mr. Boake throughout; he died before the trial of this action commenced, so we have not the advantage of his evidence. What the power of attorney authorized Mr. Boake to do is matter in dispute in this case and the relevant parts of that power will be set out later. There seem to have been delays in the payment of interest under this bond of 1928, No. 4,949, and on August 20, 1928, Mr. Boake, as plaintiff's attorney, wrote to Mr. W. A. S. de Vos, at that time a proctor of the firm of de Vos & Gratiaen, the following letter: "Please take the necessary steps to call in this loan of Rs. 70,000 with interest. This loan has been a source of anxiety to Mr. Marshall (the plaintiff) and myself for over fifteen months and I cannot allow them any more grace." As bond No. 4,949 was only executed some three months before this letter there had evidently been some earlier obligation for which this had been substituted. In spite of this letter Mr. Boake, the attorney, did not then call in the loan but allowed the bond to remain and continued to receive from the first defendant, the mortgagor, interest on the bond. Thus on January 8, 1929, the first defendant wrote to Mr. Boake enclosing a cheque for Rs. 612.50 "being half of the amount due on the attached account for interest". Mr. Boake replied by letter of the same date "I am in receipt of your letter of date with cheque for Rs. 612.50 in part payment of the interest due. Please note that the balance will have to be paid at the default rate", and he signed the letter

"*per pro* George Marshall, W. Boake". It is clear then that first defendant knew Mr. Boake was the plaintiff's attorney. He says, "The interest due to Mr. Marshall on the bond sued on I paid to Mr. Boake direct. That was so on every occasion on which interest was paid. I paid that to Mr. Boake as attorney of Mr. Marshall. He acknowledged receipt direct to me as attorney of Mr. Marshall". The next step was the attorney Mr. Boake writing to Mr. de Vos on June 25, 1929: "I have just received written instructions from Mr. Marshall that he requires repayment of the Rs. 70,000 lent to Mr. E. J. Seneviratne (first defendant), so will you please give Mr. Seneviratne three months' notice at once that repayment is required. I enclose for your information and guidance bond No. 4,949 which please return at your earlist convenience". Endorsed on this letter is a draft reply from Mr. de Vos, written by his clerk, stating that he returns the bond, and it seems clear that save on this occasion the bond always was in the custody of Mr. Boake the attorney and not at any time in that of Mr. de Vos. Mr. de Vos says in evidence that he did give three months' notice to expire on September 25, 1929, and first defendant in his evidence does admit having received a demand before he executed the bond No. 5,332, that in favour of fourth defendant; presumably then this will be the three months' notice Mr. de Vos says he sent to first defendant. The three months' notice was to expire on September 25, and on September 24 Mr. Boake wrote to Mr. de Vos as follows:—"*Re* my letter of June 25, should this loan not be repaid by the due date, please take the necessary steps to recover the principal with interest." The interpretation of this letter is one of the chief matters of dispute in this case; did its terms expressly or impliedly authorize Mr. de Vos to receive payment from the mortgagor of the debt due? There is sufficient evidence, as has been said, that Mr. de Vos had given the necessary three months' notice on June 25, and that notice would expire on September 25—the day after Mr. Boake's letter just quoted. But on September 30, five or six days later, it would appear that Mr. Boake sent a memorandum of account to the first defendant as follows:—

"*Dr.* To Mr. and Mrs. George Marshall, payable to their attorney, W. Boake.

To interest due on the primary mortgage bond for quarter ending September 30, 1929 .. Rs. 1,225"

The first defendant says he does not remember receiving this memorandum, but on the same day, and therefore apparently too early for him to have received the memorandum, his wife, the second defendant, wrote to Mr. Boake enclosing a cheque for this amount, Rs. 1,225, in payment of interest for the 3rd quarter, 1929; the first defendant admits this to be his wife's letter, she would write it as his agent. To this Mr. Boake replied on October 2 acknowledging the receipt of the cheque "which", he says, "I accept without prejudice to my rights to sue under the notice already given you calling up the loan", and again he signs himself as attorney for Mr. and Mrs. George Marshall.

The position of the first defendant after the notice of June 25 was this, that he must pay off this bond No. 4,949 either by providing the cash or by getting somebody else to take over the bond and become mortgagee

in place of the plaintiff. (It may here be mentioned that on February 21, 1929, the second defendant registered a transfer to her by the first defendant of the premises mortgaged. From this point therefore she became a necessary party to any proceedings.) Mr. de Vos says that he "thinks" first defendant saw him in connection with the repayment of the principal before the expiration of the three months, which must surely mean that the first defendant asked Mr. de Vos to help him to raise the money for paying off the plaintiff, and there is nothing in the first defendant's evidence to contradict this. Among the clients of Mr. de Vos were the fourth defendant Mrs. Poulier and her husband Mr. J. A. Poulier from whom he was receiving from time to time moneys for investment. On October 8, 1929, Mr. de Vos received a cheque for Rs. 55,000 from Mr. J. A. Poulier, but signed by his wife as his attorney, and on the same day another cheque for Rs. 5,000 from Mrs. Poulier making Rs. 60,000 in all. The entry in the ledger says that these amounts were received for investment, but Mr. de Vos says "Mrs. Poulier paid me the money for a primary mortgage . . . . The money was given to me to be lent to the Seneviratnes, *i.e.*, first and second defendants, on their bond. I am quite sure of that". The learned trial Judge accepted this account of the Poulier loan, and in the absence of other evidence would have had difficulty in doing otherwise. It is necessary to notice however that the evidence on these important matters, what the first defendant said to Mr. de Vos and what the Pouliers said to him, is scanty. The first defendant says little or nothing as to this, and neither the fourth defendant nor Mr. Poulier gave evidence. There is the curious fact that Mr. de Vos' ledger (P3) shows that on February 13, 1928, *i.e.*, twenty months before these transactions, he received Rs. 60,000 from Mr. J. A. Poulier for investment and that soon after he paid Rs. 55,000, and a few days later Rs. 5,000 to certain other parties, but as the two cheques of October 8, 1929, for Rs. 55,000 and Rs. 5,000 were produced, this must be, as Mr. de Vos says, a coincidence. To return. First defendant not being able to produce the Rs. 70,000 due to plaintiff on bond No. 4,949, had evidently asked Mr. de Vos to find him another mortgagee, someone who would advance the sum necessary to pay off plaintiff and to whom he would be bound as mortgagor in his place. The fourth defendant had handed Rs. 60,000 to Mr. de Vos for investment and had been told that the security would be certain properties of first defendant, and that second defendant his wife would also execute the bond, clearly in consequence of the registered transfer of February 21, 1929. This bond in favour of fourth defendant was drawn as a primary bond and we may be certain, though there was no evidence on the point, that the fourth defendant had been told from the start that the security for her Rs. 60,000 would be a primary bond over these properties of first defendant. It must also be inferred that fourth defendant had undertaken to advance another Rs. 10,000 so as to make up the total loan to Rs. 70,000. Mr. de Vos was her agent to obtain from first and second defendants a primary bond over the properties named therein, which are the same as those in No. 4,949—though, curiously enough, set out in a different order—and to pay over to them the Rs. 60,000 which she had given to him by the two cheques of October 8. Mr. de Vos was the agent of the first defendant to pay the Rs. 60,000

received by him from fourth defendant, to plaintiff in part payment of the debt due on his bond No. 4,949. The two agencies conflicted since, Mr. de Vos says, and his evidence was accepted, that fourth defendant never knew anything of plaintiff's bond No. 4,949, or indeed of plaintiff at all. He led the fourth defendant to believe that her money Rs. 60,000 would be paid to first defendant and to second defendant—since she joined in the bond in favour of fourth defendant—he never told her anything of plaintiff and his bond No. 4,949. The statement of Mr. de Vos that, as far as he knew, fourth defendant never knew anything of plaintiff and his bond No. 4,949 is confirmed by the fact that the bond in favour of fourth defendant was drawn as a primary mortgage, which it could not be as long as the plaintiff's primary bond No. 4,949 was undischarged. If the whole transaction had been exactly and honestly carried through, Mr. Boake would have attended with his principal's bond No. 4,949, the first and second defendants would have executed a secondary bond in favour of fourth defendant for Rs. 60,000, the money received from fourth defendant, her Rs. 60,000, would then have been handed over by Mr. de Vos to first and second defendants who would then have handed it to Mr. Boake, who would then have discharged bond No. 4,949 to the extent of that Rs. 60,000, retaining it as a primary bond for the balance of Rs. 10,000. To anticipate matters, fourth defendant did on January 27, 1930, give Messrs. de Vos & Gratiaen a cheque for the balance Rs. 10,000. This again would have been paid to the first and second defendants and handed over by them to Mr. Boake, who would then have discharged bond No. 4,949 *in toto,* and fourth defendant's bond No. 5,332 would have received an indorsement that by discharge of bond No. 4,949 it had become a primary bond. Nothing of the sort was done, of course, and Mr. Boake remained as entirely ignorant of fourth defendant and the Rs. 60,000 she had paid and her bond No. 5,332, as she remained of his principal the plaintiff and the bond No. 4,949.

To resume the narrative of facts. The Rs. 60,000 had been paid Mr. de Vos on October 8, and on October 15 the first defendant and on October 23 the second defendant (his wife) executed bond No. 5,332, drawn as a primary bond mortgaging to fourth defendant the same properties already mortgaged to plaintiff on bond No. 4,949 for the same sum of Rs. 70,000, the receipt of which they acknowledged in the body of the document in the usual manner. The first and second defendants declared themselves to be jointly and severally bound by this bond No. 5,332. It was attested by Mr. de Vos who states in the attestation clause that "no consideration passed in his presence". This was *suppressio veri* as some reference should certainly have been made to the fact that he had received Rs. 60,000 for the purpose of the mortgage. Both Mr. de Vos and first defendant say that no part of the Rs. 60,000 was paid to first defendant, and their evidence is obviously correct. Mr. de Vos says "None of the money went either to first defendant or second defendant. I kept the money in view of the instructions I had from Mr. Boake to recover the money. I kept it with a view to paying Mr. Boake . . . . I would not allow that money to get into the hands of Mr. Seneviratne (first defendant)", and when asked whether he looked on the payment by fourth defendant of the Rs. 60,000 as a

payment to the first and second defendant, he said "It was not a payment to the Seneviratnes at the time it was paid to me . . . I would not have considered I had authority to pay it to the Seneviratnes at the execution of the bond until it was registered"; bond No. 5,332 actually was registered on November 7, 1929. The first defendant says, "I did not get that money".

The evidence leaves several things only partially cleared up. The fourth defendant did not attend the execution of bond No. 5,332, and Mr. de Vos says he "did not produce the bond" to her, and you are left wondering what story he told her in explanation of the fact that though she had paid him only Rs. 60,000 she yet got a primary bond for a larger sum, Rs. 70,000. She did pay him the balance Rs. 10,000 on January 27, 1930, but she had got bond No. 5,332 for the larger sum three months previously. With regard to Mr. Boake and plaintiff's bond No. 4,949, Mr. de Vos, after saying that he did not pay any money to first defendant or second defendant but that he kept it with a view to paying Mr. Boake, says "I paid Mr. Boake Rs. 35,000 in instalments. That left a balance of Rs. 35,000 in my hands to be paid to Mr. Boake. That was never paid", and further on he says, "the balance Rs. 35,000 was used by me". He gives no dates or details, but in P 5 which is an account in the ledger of Messrs. de Vos & Gratiaen headed J. A. Poulier, there is an entry dated December 21, 1929, "To cheque, W. Boake, Rs. 1,225". Now this sum was a quarter's interest on the whole Rs. 70,000, so according to this account he had not paid over any portion of the principal debt to Mr. Boake before that date, December 21, 1929, but as will be shown later it is very doubtful if this account can be relied on for any purpose. There is no evidence as to why Mr. Boake allowed the bond No. 4,949 to remain outstanding, but he evidently did so since paragraph 7 of the plaint admits payment from time to time of sums aggregating Rs. 35,000 (giving credit to first defendant for that amount) and payment of interest on the bond up to and including March 21, 1931. There is not, I think, evidence before us that the firm of Messrs. de Vos & Gratiaen went insolvent, but this fact was assumed throughout the case by both sides. The date of its insolvency was November 17, 1931. There is no dispute by any of the defendants that plaintiff has never received in cash the balance Rs. 35,000 claimed by him on his bond No. 4,949.

The position of the first and second defendants is stated in paragraph 3 of their answer, as follows :—

"3. Further answering to paragraph 7 of the plaint these defendants state—

(*a*) that W. A. S. de Vos of Colombo was at all times material to this action the agent of the plaintiff for the purpose of collecting sums due and owing from the first defendant to the plaintiff under the bond No. 4,949 marked letter 'A' and filed with the plaint;

(*b*) that these defendants have paid to the said W. A. S. de Vos as agent of the plaintiff as aforesaid all sums due and owing as principal and interest from the first defendant to the plaintiff under the said bond No. 4,949, and that no sum whatsoever is now due to the plaintiff under the said bond."

The fourth defendant in her answer adopts the same position in slightly different phraseology. We must analyse the contention. On October 8, the fourth defendant paid and Mr. de Vos received Rs. 60,000 to be lent to first defendant and second defendant on their bond. Mr. de Vos received it for that purpose and was under a duty to hold it in his safe-keeping until the first and second defendant had executed a bond for it. Until they had done so he could not hand the money to them for payment to Mr. Boake, plaintiff's attorney, still less could he hand it to Mr. Boake direct. It cannot be argued—indeed was not—that during the interval between fourth defendant handing this money to Mr. de Vos on October 8, and the execution of bond No. 5,332 on October 23, Mr. de Vos was holding it as agent of Mr. Boake or on his behalf. It was not money received to Mr. Boake's use. Could he prior to the execution of the bond by first and second defendants have sued for it as such? Clearly not. The bond, a joint and several obligation, was executed on October 23, and it could be argued that from that moment but not sooner the Rs. 60,000 was being held by Mr. de Vos as agent for Mr. Boake, plaintiff's attorney on his behalf, and that therefore there had been payment of that amount to plaintiff through the hands of Mr. de Vos, agent for his attorney Mr. Boake, and that plaintiff's bond No. 4,949 was discharged to that extent. But there is a question of fact to be determined first. Is there proof that the Rs. 60,000 was still in possession of Mr. de Vos on October 23, the date of the execution of the bond No. 5,332?

The first and second defendants over payment to plaintiff of Rs. 60,000 on October 23, and beyond doubt the onus was on them to show that there was that money available for payment to the plaintiff up to the time of the execution of bond No. 5,332, and the onus certainly seems to continue until the moment after its execution, the moment when it became binding. At that moment having executed bond No. 5,332, first and second defendants claim that they had released the Rs. 60,000 then in Mr. de Vos' hands for payment to the plaintiff through his attorney Mr. Boake, and that by so doing they had paid plaintiff Rs. 60,000 on his bond No. 4,949, but this contention is conditioned by the words " then in Mr. de Vos' hands "; they must prove this.

Now for the evidence on this matter we are dependent entirely on that of Mr. de Vos. He refers to the page 228 in his ledger for 1929—Mr. J. A. Poulier's account—and says, " But I wish to state that the bulk of these entries are all false. There are a number of cheques entered here as given to Mr. Poulier which are really cheques drawn by me in my favour ". Later on he says, " I had for some time about this time 1929-1930 embezzled a considerable amount of the clients' money in the firm. For that purpose I had to make a large number of false documents and give a large number of false statements to my clients ". Now the documents put in on this point were, first, a certified copy, P 5, page 229, of a ledger for 1929, headed, J. A. Poulier. This page shows a number of similar entries, " To cheque in his favour " giving the amount, one entry, " To cheque, W. Boake, Rs. 1,225 "—this has been referred to above—and two entries, each crediting the account with Rs. 3,500, or Rs. 7,000 in all. " By cheque of C. M. T. G., Ltd.," this being a company (as was agreed in argument) in which Mr. de Vos was largely interested,

and the page is summed up to show a sum of Rs. 61,985 paid out and Rs. 7,000 received, balance debit Rs. 54,985. This balance Rs. 54,985 is carried over to page 103 of the ledger for 1930, account J. A. Poulier, of which again a certified copy is put in, P 4. Now the account, P 5, on page 229 of the 1929 ledger, is not linked up with any earlier account. It does not show why J. A. Poulier was entitled to receive this succession of cheques drawn in his favour, nor does it credit him or the fourth defendant (his wife) with the Rs. 55,000 which he had paid on October 8, or with the Rs. 5,000 she had paid the same day. We were urged to say that as the entries in this account "To cheque in his (Mr. Poulier's) favour" from October 4 to October 23 only totalled Rs. 25,260 paid away, we ought to assume that the balance of the Rs. 60,000, namely Rs. 34,740, was in Mr. de Vos' hands up to October 23, and became plaintiff's money immediately on execution of bond No. 5,332. To this would have to be added the Rs. 10,000 paid to Mr. de Vos by fourth defendant on January 27, 1930, total Rs. 44,740, which should go in reduction of plaintiff's claim as having been paid to Mr. de Vos his agent to receive the same, whereby plaintiff would be entitled to judgment in this action for the balance Rs. 25,260 only, but not to anything in excess of that amount. But the question is, can any reliance be placed on this page 229, P 5, of the 1929 ledger, to establish that the Rs. 60,000 or some definite part thereof was still in the hands of Mr. de Vos on October 23. Clearly no reliance can be placed on it. Mr. de Vos has said, and his evidence was accepted, that the entries in this account were mainly false; can we say then that any particular item or items of any particular date or dates are to be accepted as true? Clearly we cannot. The account itself too, unconnected with anything else, starting from no *data* and containing the two payments in from a firm that admittedly Mr. de Vos was interested in but not necessarily the Pouliers, would in itself require explanation and connection with other accounts before it could be accepted. If the first and second defendants wish to show that on October 23, 1929, Rs. 60,000 was in the hands of Mr. de Vos available for payment to the plaintiff, then they should have produced a reasoned statement from the ledgers of his then firm showing that that amount was at the credit of that firm on that day, and so available for payment to the plaintiff. After Mr. de Vos' evidence, which has been accepted as has been said, it is impossible to assume that such an amount was available. It was for the first and second defendant to show that it was, and they have not done so. Then as to this amount Rs. 60,000, the first and second defendants' case fails.

The Rs. 10,000 paid to Mr. de Vos by the fourth defendant on January 27, 1930, is on a different footing. It was paid to Mr. de Vos after bond No. 5,332 had been executed and was therefore available the moment Mr. de Vos received it for payment by him to Mr. Boake, plaintiff's attorney, and the question then whether the first and second defendants are entitled to succeed to the extent of this Rs. 10,000 would depend on whether at the time Mr. de Vos received it he was authorized to receive money in payment of the amount due on plaintiff's bond No. 4,949. If he was so authorised it will be by virtue of the letter of September 24, 1929, I D 5, written by Mr. Boake to Mr. de Vos, "*Re* my letter of June 25, should this loan not be repaid by due date, please take the necessary steps

to recover the principal with interest". It was argued for the appellants that the words "should this loan not be repaid by due date" tacitly implied an authority to Mr. de Vos to receive the money should it be brought him, and that these words, properly interpreted, mean this, 'the money has not been repaid to me, Boake, and if by September 25, it is not repaid to you, de Vos, please take the necessary steps to recover it and obtain payment of it'. How, it was argued, could Mr. de Vos know that September 25 had elapsed without Mr. Boake receiving payment, unless Mr. Boake wrote him yet another letter. We must take this letter of September 24 as something complete in itself, not needing a further letter from Mr. Boake to become an effective mandate, and if so it contemplates a receiving of the money by Mr. de Vos and therefore an implied authority to him to receive it.

Now granting this to be a reasonable interpretation to put on the words in the letter "should this loan not be repaid by due date", still the letter must be examined as a whole, the direction it contains as well as the condition attached to that direction. First, then, the condition "should this loan not be repaid by due date". Due date means, September 25. Up to and including that date, Mr. de Vos would, on the argument for the appellants, have had authority to receive repayment but clearly not after that date. Once that date had passed without the loan being repaid —which was admittedly what happened, nothing was repaid by that date—all the letter authorized him to do was to take the necessary steps to recover the principal with interest. These necessary steps would not include demand, for that had already been made by Mr. de Vos' letter of June 25. "Recover" means, recover by legal process, consequently the next step the recipient of the letter, Mr. de Vos, should have taken would have been to send to Mr. Boake as soon as September 25 had expired a blank proxy for execution by Mr. Boake empowering the firm of Messrs. de Vos & Gratiaen to commence action against first defendant for the amount owing, principal and interest. That was the next "step"—sections 24 and 27 of the Civil Procedure Code—towards the "recovery" of this money. What other step is contemplated in the letter? Demand had already been made, so to say the letter means "demand again" would be to make it otiose. I can think of no necessary step for the recovery of principal and interest save taking action, and for this a proxy was necessary, that is Mr. de Vos would have had to apply to Mr. Boake for one. Sections 24 and 27 of the Civil Procedure Code do not make the form in Schedule II. to that Code, the obligatory or sole form of a proxy, but we may assume that Mr. Boake would contemplate that form of proxy as the one to be used. When a client executes a proxy in this form, he authorizes the proctor "to receive and take all moneys that may be paid him by the defendant in the action and to move for and obtain in his name any order or orders from the Court for any payment of any sum or sums of money that may be deposited therein", but until a proctor receives such a proxy he has no authority to receive money due to a client, unless of course the client has given him that authority *aliunde*. The only authority the client in this case can be argued to have given to the proctor to receive the money is the letter of September 24—we are thrown back on that—and I cannot collect from the terms of that letter

any authority to receive the money owing, at least after the expiration of September 25, even on the interpretation of the letter most favourable to the appellants' case.

The course of dealing between the three persons involved—Mr. Boake, Mr. de Vos, and first defendant—tends to the same conclusion. The first defendant always paid the interest direct to Mr. Boake, never to Mr. de Vos, and Mr. de Vos had never received or apparently claimed to receive or been tendered, any interest under the bond at any time. The bond was with Mr. Boake, so application to him was necessary if the receipt of any payment of principal was to be endorsed thereon. Again, the letter of September 24 requires recovery of principal and interest and only Mr. Boake knew what interest was owing; at any rate Mr. de Vos did not, for none such was ever paid him. Then before he could effectively receive payment of principal and interest he would have to apply to Mr. Boake for further information. In other words the letter of September 24, as a mandate to receive payment, was not then in itself a complete mandate, yet surely on the argument for the appellants it should be a complete one if, by virtue of it, payment to Mr. de Vos was to be the equivalent of payment to Mr. Boake, plaintiff's attorney.

It is not proved to me that Mr. Boake's letter of September 24 was an authority to Mr. de Vos to receive payment on his behalf from the first defendant.

One further remark to finish this aspect of the case. Mr. de Vos says in his evidence that he did get a proxy from Mr. Boake, but he adds "that is my recollection but I cannot be certain of it". He gave no date or details nor did he refer to any document and there certainly is nothing in the documents produced, including this letter of September 24, suggesting that Mr. Boake ever did give him a proxy. The judgment makes no mention of this part of Mr. de Vos' evidence. Evidently the learned District Judge did not take seriously the vague and doubtful assertion of Mr. de Vos—for it is nothing more—that Mr. Boake did send or give him a proxy. No argument was addressed to us that Mr. de Vos at any time received a proxy from Mr. Boake.

But even assuming that the letter of September 24 was so worded as to authorize Mr. de Vos to receive the money owing so as to make his receipt that of the plaintiff, it still remains necessary to examine the power of attorney granted by the plaintiff to Mr. Boake, to see whether under it Mr. Boake could give that authority to Mr. de Vos. That power of attorney was the only document under which Mr. Boake could act for the plaintiff and his power to bind the plaintiff must be found within it and not elsewhere. That power of attorney recites that the grantor has certain mortgages of real estate in the Island of Ceylon and that it is necessary to appoint an attorney there for the purpose mentioned,—that is, for the purpose of these mortgages, and in interpreting a power of attorney the recitals control the operative portions—and then goes on to confer the following power :—

> "Power in my name and on my behalf to ask, demand, sue for, recover, and receive all debts of whatsoever nature now owing or payable to me or which may hereafter become owing or payable to me by individuals, firms or companies in the said Island, and on

payment or delivery thereof to give, sign, and execute receipts, releases, and other discharges for the same, and on non-payment to commence, carry on, and prosecute any action or actions, suit or suits, or other proceedings whatsoever before any court or courts of law in the said Island for receiving and compelling the payment thereof: To appear before any court or courts of law or justice in the said Island as plaintiffs, defendants, claimants, added party, or in any other capacity and to sign and grant all necessary appointment or appointments to any proctor or proctors of the said courts, and to prosecute or defend any suit or suits or other proceedings brought by or against me and to proceed to judgment, and to appeal against any judgment, order or decree of any of the said courts and to prosecute such appeal before the Supreme Court of the said Island and give all necessary securities of such appeal. To transfer and assign mortgage bonds or other securities held by me and to sign all necessary deeds in that behalf. To purchase at Fiscal's sale any property sold under any writ issued in any action instituted on my behalf by my attorney and to sell the property so purchased and to sign all necessary deeds for such purposes and generally to do, perform, execute, and prosecute all other acts, deeds, and things whatsoever which may be necessary or expedient in relation to the premises as fully and effectually to all intents and purposes as I could or might do if present: And I hereby declare that the receipt in writing of my attorney acting for the time hereunder for any moneys shall be a sufficient discharge for the same and shall effectually exonerate the persons paying the same."

This instrument then empowers the attorney appointed "to ask, demand, sue for, recover, and receive all debts" owing to the grantor; it contemplates that it shall be the attorney who "receives" them, it gives him power to do so and, on the principle *expressio unius est exclusio alterius*, would seem not to give that power to anyone else. It goes on to give the attorney power to bring and defend actions and to sign and grant all necessary appointment or appointments to any proctor or proctors. As the power was to operate in the Island and in it only, it may be supposed that in giving the authority to appoint proctors the grantor had in mind the usual form of proxy, Form 7, Schedule II., of the Civil Procedure Code, which empowers a proctor to "receive and take all moneys" paid in the action for which he receives the proxy, but the authority of the proctor to receive them would be by virtue of having received the proxy and he would not have such authority without he had first received a proxy. But in this case it is not contended that any proxy was given, and there is no proof that any proxy was given, and beyond question none preceded or accompanied the letter of September 24. The attorney, Mr. Boake, had no power then to authorize Mr. de Vos to receive moneys due to his principal the plaintiff. Then no receipt of money by Mr. de Vos could be a receipt by an agent of the plaintiff or a receipt on behalf of the plaintiff. On this ground also then the appeal fails.

The first defendant knew that he was dealing with the attorney of a principal, that is, with a person possessed of a special or limited authority; this is proved from the letters, demands for interest, and receipts for

same, received by him from Mr. Boake in which the latter signs "*per pro*" and describes himself as attorney for another person. Consequently first defendant was "bound at his peril to inquire into the extent of the agent's authority" (*Bryant, Powis, and Bryant v. La Banque du Peuple*[1]); he "was in the same position as if the power of attorney had been perused" by him (*Jonmenjoy Coondoo v. Watson*[2]). If then first defendant paid moneys to Mr. de Vos, or to be accurate, allowed fourth defendant to pay moneys to him on his, first defendant's behalf, without inquiring whether Mr. de Vos had power from the plaintiff to receive them so as to make receipt by Mr. de Vos a receipt by or on behalf of the plaintiff, and if it turns out that Mr. de Vos had not in fact that power, then the loss must fall on first defendant.

"Powers of attorney are to be construed strictly, that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication"—*per* Lord Macnaghten in *Bryant, Powis, and Bryant v. La Banque du Peuple* (*supra*), but the authority given expressly in this power of attorney to receive moneys owing is an authority given to the attorney and not to anyone else, and it is difficult to find in it any other or additional authority "by necessary implication" to anyone else to receive moneys owing. It was argued for the appellants that there was an implied authority in this power of attorney to the attorney named to "delegate" the powers conferred on him, but if so there could only be this implied power to delegate where the act to be done was purely ministerial and did not involve confidence or discretion. Put in full, the argument would be that Mr. Boake by his letter of September 24 delegated to Mr. de Vos the power to receive the moneys owing. But could it be said that this delegation of authority to a proctor to receive money was delegation of authority to do a purely ministerial act not involving confidence or discretion? The fact that a proctor, a professional man, was employed is surely an argument to the contrary. The English case cited to us (*Hemming v. Hale*[3]) is really against the appellants. There, a solicitor was employed to carry through certain litigation and to receive certain moneys the results of same which were then in the hands of the sheriff. He allowed the moneys actually to be received from the sheriff by a clerk in his employ who absconded with them and it was held that this was a receipt by the solicitor, the agent of the plaintiff, and that the loss must fall upon the plaintiff; the delegation to the clerk to receive the money was one to do a purely ministerial act. To make *Hemming v. Hale* (*supra*) applicable in favour of the appellant, the facts here would have to be that Mr. de Vos had been in the employ of the attorney, Mr. Boake.

A number of English cases were cited to us on both sides illustrating the powers as agent of an attorney, but those cases are apt to mislead, unless the term "attorney" is carefully defined. Those cases dealt with the powers of an attorney, meaning by that term the species of law agent

[1] (1893) *A. C. at 177.* [2] *9 A. C. at 566.*

[3] *7 C. B. (N. S.) 487; 29 L. J. C. P. 137*

now more usually known as a solicitor. The law agent known as a solicitor is in many respects like the proctor with us though there are differences; for instance, a proctor to institute action for his client must file a proxy from him. In England such a proxy is unknown and a solicitor does not file any document of authority when instituting an action for a client. But in the main rules applicable to one species of law agent are applicable to the other. The cases cited to us included *Wilkinson v. Candlish*[1], *Kent v. Thomas*[2], and a very recent case, *Bonham v. Maycock*[3]—all three of which decided the same point, that the law agent known as a solicitor who receives interest for a mortgagee and has authority to receive it either by reason of the mortgagee's conduct or by express direction from him, does not thereby possess any authority to receive the principal debt due on the mortgage. In the last of these cases Roche J. quotes from *Kent v. Thomas,* as follows:—"In this case he was the agent of the plaintiff to receive the interest, but as to the principal, Parke B., in *Wilkinson v. Candlish,* pointed out that an authority to receive the interest on a mortgage by no means imports an authority to receive the principal." The other case cited to us was *Yates v. Freckleton*[4], where it was held that though it had formerly been doubted whether payment to the attorney was payment to the party, it was now settled that it was. Attorney in that case means of course that species of law agent known as an attorney.

These cases then dealt with the authority of a solicitor, though they usually give him the name of attorney, but to cite them as authorities for what may be done under a power of attorney risks the fallacy of using the same term in two different senses. The authority of the law agent, sometimes even now called an attorney but more usually a solicitor, is an implied authority; the law clothes him with certain powers and duties, and when a man employs a solicitor he impliedly authorizes the solicitor to act for him in accordance with those powers and duties and if by express instructions he limits those powers in any way, he must show that the person with whom the solicitor deals knew in what respect those implied powers were expressly limited, otherwise that person will not be affected. The authority given by a power of attorney on the other hand is an express authority to be found not by implication but from the terms of the power appointing the attorney. Once a person is aware that the man he is dealing with acts under a power of attorney it is at his peril not to know the extent and limits of that power. Apply this to the present case. Even if *Yates v. Freckleton* (*supra*) was law with us and the law was that payment to the law agent was in all cases payment to the principal employing him, still if that person employing him were known by the party paying to be an attorney—that is, an agent acting under a power of attorney, as are the facts here,—he would not be safe in paying to the law agent unless the power of attorney allowed the person holding it, expressly or by necessary implication, to delegate to the law agent the power to receive payment. Here the power of attorney seems in express terms to confine the power to receive money to the holder of that power, at least until a proxy has been given to the law agent and

[1] *5 Ex. 91; 155 E. R. 39.*
[2] *1 H. & N. 473; 156 E. R. 1287.*
[3] *138 L. T. 736.*
[4] *2 Doug. 623; 99 E. R. 394.*

action has been commenced by him. Then the cases cited to us, including *Yates v. Freckleton* (*supra*), do not seem to me to be in point in the present matter.

To recapitulate. On the facts, the appellants' case could only succeed as to the Rs. 10,000 but not as to the Rs. 60,000, for it was not proved that any part of this sum was available for payment to the plaintiff at the date when Mr. de Vos could be deemed the agent of the plaintiff to receive it. The letter of September 24 does not seem to have conferred any authority on Mr. de Vos to receive moneys on behalf of the plaintiff once at any rate September 25 had passed. But apart from these two aspects of the case, the power of attorney granted to the plaintiff's agent confines the powers of receiving money, in payment of the mortgage debt owing, to the holder of that power of attorney. Consequently payment to someone else was not and could not be payment to the holder of that power, and if so, then not to the plaintiff either.

I am of opinion that this appeal must be dismissed with costs.

DRIEBERG J.—

The plaintiff brought this action on a mortgage bond No. 4,949 of May 24, 1928, executed in his favour by the first defendant. This bond, by which certain lands were mortgaged, was to secure a sum of Rs. 70,000 lent to the first defendant. The plaintiff alleged that the first defendant had repaid Rs. 35,000 of the principal and had paid all interest due to March 31, 1931. He claimed a sum of Rs. 37,483.56 balance principal and interest.

The first defendant by a bond No. 1,692 of October 9, 1928, mortgaged the same lands to the third defendant. By deed No. 5,079 of February 21, 1929, the first defendant transferred these lands to his wife, the second defendant. The first defendant and his wife by 1 D 6, executed on October 15 and 23, 1929, mortgaged these lands to the fourth defendant. The second, third and fourth defendants have been made parties to this action as they have acquired an interest in the property subsequent to the plaintiff's mortgage.

By a power executed by the plaintiff in Scotland on June 3, 1929, the plaintiff appointed Reginald Lyons and in his absence from Ceylon or otherwise William Boake and, failing Boake, R. A. Smith, to be his attorney in Ceylon for certain purposes. This action was brought by the plaintiff by his attorney Boake who has since died.

The first defendant defends the action on the ground that the plaintiff received payment as the result of the execution by him of the bond 1 D 6 in favour of the fourth defendant, Mrs. Poulier. He says that on the suggestion of de Vos, a proctor and notary employed by Boake to recover the amount due by him, he executed in favour of Mrs. Poulier the bond I D 6 for Rs. 70,000 the arrangement being that de Vos should pay the money received from her to Boake and have his bond to the plaintiff discharged. He says that this money was received by de Vos from Mrs. Poulier with his sanction and that the payment to de Vos was a payment to Boake. His position is that de Vos had sufficient authority from Boake to receive payment, Boake himself, under the power of

attorney from the plaintiff, having the power to authorize de Vos to receive payment. It will be necessary to consider later more fully the circumstances attending the execution of 1 D 6.

On August 20, 1928, by 1 D 2 Boake asked de Vos to call in the loan to the first defendant; interest was then due from April 1 of that year. On October 3, 1928, by 1 D 4 Boake wrote to de Vos expressing surprise that he had not carried out his instructions and asked him to do so immediately. On June 25, 1929, by 1 D 4 Boake wrote to de Vos to give the first defendant three months' notice that repayment was required. The bond provided for this notice if the debtor was not in arrears in payment of interest. Boake sent with this letter the bond No. 4,949 for de Vos' "information and guidance", requesting its return at his earliest convenience. De Vos gave the first defendant notice demanding repayment and returned the bond to Boake. The time limited for payment by this notice was September 25, 1929. On September 24, 1929, Boake wrote to de Vos the letter 1 D 5 as follows:—"*Re* my letter of the 25th June, should this loan not be repaid by due date please take the necessary steps to recover the principal with interest".

De Vos says that after the demand was made of him the first defendant asked him to raise the money from elesewhere and pay the plaintiff; de Vos agreed to do so. He had a client, Mrs. Poulier, whose money he used to invest. He arranged a loan by Mrs. Poulier of Rs. 70,000 to the first defendant and his wife—the first defendant had transferred the lands to his wife in February, 1929—on a mortgage, described as primary, of these lands, the money lent by Mrs. Poulier being paid not to the first and second defendants but to Boake in discharge of the plaintiff's mortgage, the mortgage to Mrs. Poulier becoming on the discharge of the plaintiff's bond a primary mortgage. Mrs. Poulier knew nothing of this arrangement beyond the fact that she was lending Rs. 70,000 to the first and second defendants on a primary mortgage. She was not told by de Vos of the plaintiff's mortgage and it would not have affected her conduct if she had, for she would have trusted de Vos to do what was necessary to make her security a primary one. The first and second defendants signed the bond in favour of Mr. and Mrs. Poulier on October 15 and 23, 1929, the first defendant believing that de Vos had received Rs. 70,000 from Mrs. Poulier and trusting to de Vos to pay off the plaintiff's claim with it.

There can be no doubt regarding the obligations of de Vos to Mrs. Poulier and to the first defendant, and of his relations with them. Having arranged for a primary bond in Mrs. Poulier's favour, it was his duty to apply, to the discharge of the plaintiff's bond, the money she was lending, and he was her agent for that purpose. The first defendant signed the bond 1 D 6 on the understanding that the money he was entitled to on it should be retained by de Vos and applied to the discharge of the plaintiff's bond, and de Vos was his agent for the payment to Boake. Both parties to 1 D 6 had complete confidence in de Vos, but de Vos, who was subsequently convicted of criminal misappropriation of clients' money, admitted that at that time he had embezzled considerable money

of clients. There was, however, at that time no reason to suspect the honesty of de Vos.

Out of such money of Mrs. Poulier as was available to him, de Vos paid to Boake Rs. 35,000. He said he paid it in instalments but we do not know the dates or amounts of the payments. The plaintiff has given the first defendant credit for this in reduction of the principal sum. De Vos had received from Mrs. Poulier Rs. 70,000 for the purpose of the loan to the first defendant,—I shall deal later with the manner in which the money was received by de Vos—he admits that he misappropriated the balance Rs. 35,000.

If the first defendant is to succeed in his defence of payment he must prove that Boake authorized de Vos to receive the money in the manner adopted, so that a payment by or on account of the first defendant to de Vos would be as complete and effective as a payment to Boake himself, and this would imply that de Vos had the power on receiving payment to release and discharge the first defendant from liability to the plaintiff. He would further have to show that Boake, in granting such authority to de Vos, was acting within the powers conferred on him by his appointment from the plaintiff. He would also have to prove that when the bond 1 D 6 was executed Mrs. Poulier gave de Vos Rs. 70,000 and that de Vos had Rs. 70,000 of Mrs. Poulier's money available for payment to Boake.

In the power of attorney the plaintiff set out that he held certain mortgages of real property in Ceylon and that it was necessary that he should appoint an attorney for certain purposes and with certain powers, which are as follows:—

> "Power in my name and on my behalf to ask, demand, sue for, recover, and receive all debts of whatever nature now owing or payable to me or which may hereafter become owing or payable to me by individuals, firms, or companies in the said Island, and on payment or delivery thereof to give, sign, and execute receipts, releases, and other discharges for the same, and on non-payment to commence, carry on, and prosecute any action or actions, suit or suits, or other proceedings whatsoever before any court or courts of law in the said Island for receiving and compelling the payment thereof. To appear before any court or courts of justice in the said Island as plaintiff, defendant, claimant, added party, or in any other capacity and to sign and grant all necessary appointment or appointments to any proctor or proctors of the said courts and to prosecute or defend any suit or suits or proceedings brought by or against me and to proceed to judgment, and to appeal against any judgment, order or decree of any of the said courts and to prosecute such appeal before the Supreme Court of the said Island and give all necessary securities and sign all necessary bonds for the prosecution of such appeal; to transfer and sign mortgage bonds or other securities held by me and to sign all necessary deeds in that behalf; to purchase at Fiscal's sale any property sold under any writ issued in any action instituted on my behalf by my attorney and to sell the property so purchased and to sign all necessary deeds for such purposes and generally to do, perform, execute, and prosecute all other acts, deeds, and things whatsoever which may be necessary or expedient in relation to the promises as fully and effectually to all intents and

purposes as I could or might do if present, and I hereby declare that the receipts in writing of my attorney acting for the time hereunder for any moneys shall be a sufficient discharge for the same and shall effectually exonerate the person paying the same and no such person shall have any right to inquire as to the application thereof."

In giving his attorney power to appoint a proctor for the purpose of an action the plaintiff did no doubt authorize his attorney to employ another to do that which the attorney could have done himself, for a person can institute and carry on an action without a proctor—the power in fact gives the attorney power to do so. If a payment was made to a proctor formally appointed by the attorney to institute an action, a question, which is not free from difficulty, would arise if the debtor paid the claim to the proctor in consequence of such action and the proctor failed to pay the money to the attorney. I shall consider later whether the payment in question can be regarded as made under such circumstances; but putting aside for the moment the case of a proctor formally appointed for the purpose of an action, I think it is clear that the power does not allow of the attorney appointing someone else to receive payment and give a discharge of a debt due to his principal. There is first the power given to receive, demand, and recover debts and to sign and execute releases and discharges for payments. Then follow provisions for the attorney on non-payment suing for the recovery of debts, and also for the appointment of a proctor; after provision for appeals and matters arising out of execution proceedings there follows the declaration that the receipts of the attorney in writing should effectually exonerate any person making payment. It is only the attorney who can give a discharge on payment, and if de Vos had that power it could only be the result of a power necessarily following on his employment by the attorney and implied by his being so employed.

Such authority as de Vos had must be sought in the letter 1 D 5 which was written on the day before September 25, till which the first defendant had time for payment. It was argued that the direction that steps should be taken "should the loan not be repaid by the due date" showed that Boake thought of the possibility of direct payment to de Vos as the result of the demand of repayment Boake by 1 D 4 authorized de Vos to make. There is nothing to be gained by a consideration of this part of the letter, for the question must be determined by the power of attorney given to Boake and not by his view of his powers under it. But as it has been pressed I might say that it does not necessarily follow that Boake had an idea of de Vos receiving the money and releasing the first defendant. Boake apparently knew, when writing on the 24th, that payment had not been made and he may have thought that the first defendant who paid him interest direct might, if the payment was made at the very end of the time limit, have taken to de Vos a cheque in favour of Boake.

What did Boake mean when in 1 D 5 he asked de Vos to "take the necessary steps to recover the principal and interest"? It was contended for the plaintiff that what was meant was that de Vos should take steps to recover the money by action, and if this is so the first step for de Vos to take was to send Boake a proxy for his signature. He would also have needed the bond, which he had returned to Boake with his letter

1 D 4 of June 25. De Vos said that he had an idea that he got a proxy from Boake "to keep him quiet", but he could not be sure of this. It does not, however, matter whether he got one or not. Such a proxy would only operate on its being presented in Court, and this was not done. It is important to note that if de Vos had filed action he could not have drawn, without the consent in writing of Boake, any money paid into Court by execution or otherwise; without such consent the order of payment would have to be in favour of Boake.

It was argued for the first and second defendants that Boake by 1 D 5 gave de Vos authority to recover the money in any way, by which I understand in any way within his province as a proctor and notary. In my opinion the letter does not mean this, but what Boake directed was that if payment was not made by the 25th de Vos should take steps to file action. It is extremely unlikely that he had anything else in mind.

If the contention of the first and second defendants is correct there are other things de Vos might have done; de Vos might, for example, have found a buyer for the property and if the buyer paid the entire price to de Vos, directing him to apply Rs. 70,000 of it in discharge of the mortgage to the plaintiff, would that be payment to the plaintiff even though de Vos misappropriated the money? And would it make any difference if Boake had been told of the proposed sale and authorized de Vos to receive the money? There is no difference between the money being obtained by the sale of the property, or by the assignment of the plaintiff's bond to another lender, or by a fresh bond to a new lender as is the case here. To be able to give such power to de Vos, Boake would need authority under the power of attorney of completely delegating to someone, other than a proctor appointed for an action, his power of receiving payments and releasing debts, but Boake had not this power. If he could not delegate this power, let us say, to a bank or to any person who undertakes the collection of debts as a matter of business, he could not delegate it to de Vos for the reason only that de Vos was a proctor. Proctors are employed for many purposes, other than the institution of actions, some of which might be done as well by any man of business.

The appointment of a proctor which the power authorized is for a proceeding in Court; this is clear from the context "To appear before any court or courts of justice . . . . and to grant all necessary appointment or appointments to any proctor or proctors of the said courts". This power of attorney, if not prepared in Ceylon, must have been drafted with a knowledge of Ceylon institutions; I have in mind the words "Fiscal's sale" and "appointment of a proctor". Such an appointment is that provided for by sections 24 and 27 of the Civil Procedure Code for the purposes of appearances, applications or acts in Court; the form of the appointment is No. 7 in Schedule II. of the Code. It is an appointment for the purpose of a particular action. I referred to a question which would arise if after such an appointment a defendant were to make a payment to the plaintiff's proctor. The form confers considerable powers and it would allow of the plaintiff's proctor receiving payment from the defendant and giving him a discharge. But sections 24 and 27 make no reference to the form, though in some other cases the forms are referred to,—see section 225. Though the form of the proxy authorizes the

appointed proctor to obtain in his name orders of payment for money deposited in Court, our Courts do not allow this.

It is not possible to regard the letter 1 D 5 as the appointment of a proctor provided for by the power of attorney and if, as the appellants contend, it was an authority to de Vos to recover the money by any means including action and release them from liability, Boake had no power to give such authority to de Vos. I have not been able to derive any help from the cases cited at the argument. If Boake was entitled to employ a proctor generally to recover the money, questions of the implied authority of a proctor, as agent, would arise, but such a general employment is not authorized.

There remains to be considered whether when the bond 1 D 6 was executed de Vos had Rs. 70,000 of Mrs. Poulier's money available to him for payment to Boake. On October 8, 1929, there were paid to the account of de Vos & Gratiaen, de Vos' firm, two cheques (1 D 7 and 1 D 8): one for Rs. 55,000 by Mrs. Poulier as attorney of her husband, and another for Rs. 5,000 by Mrs. Poulier. Another cheque for Rs. 10,000 was paid in by Mrs. Poulier on January 27, 1930; 1 D 6 was signed on October 15 and 23, 1929. De Vos said the cheques were received for the loan to the first and second defendants. When 1 D 6 was signed by the first and second defendants de Vos should have paid Boake at least the Rs. 60,000 paid in by Mrs. Poulier on October 8, but was it then available to him? This is a point on which the burden of proof is on the first and second defendants and I do not think they have discharged it. We have only P 5 which is the account of J. A. Poulier with the firm of de Vos & Gratiaen; we can take it that this was the account of the money received from Poulier and his wife. In the account between October 4 and October 23, 1929, appear entries of four cheques described as "to cheque in his favour" amounting to Rs. 25,250; these cheques would have reduced the Rs. 60,000 standing in the account of the Pouliers to Rs. 34,750 at the execution of 1 D 6. Whether de Vos had been this sum in his account we do not know, for his bank account is not in evidence. De Vos admits that for some time before this he had been misappropriating clients' moneys, and as regards the Poulier account he confesses to a number of false entries—cheques drawn in his own favour being shown as payments to J. A. Poulier. The first and second defendants cannot claim a payment of Rs. 60,000 at the time of the execution of 1 D 6 unless they showed that de Vos had then in his account that sum of money on which he could have drawn. He could only have drawn, so far as the account P 5 shows, Rs. 34,750, but in view of de Vos' evidence of his conduct at that time I do not think we can assume, without seeing his bank account, that he had even that sum available for payment; it is possible that he had not the money then and that the Rs. 35,000 paid to Boake was the money of some other client. Even if de Vos had the money available at the time of 1 D 6 the defence fails for the reason that Boake had no power to delegate to de Vos his right of receiving payment and granting a release.

The case of the first and second defendants is a hard one, but I think if we are to consider the question from the point of view of which of the two innocent parties should suffer for the fraud of de Vos, they or the plaintiff,

I think the equities of the case favour the view that the plaintiff should not suffer. We have on the one hand the plaintiff absent from the Island, trusting for the safety of his interests to the integrity of his attorney and making provision in the power that his attorney alone should have the power of granting release of debts; nothing that his attorney Boake could have done could have prevented the fraud, and its happening cannot be attributed, in the least degree, to remissness or want of vigilance on his part. On the other hand the first defendant had hitherto made payments to Boake direct, and even after the period of three months for payment was over his wife sent direct to Boake on September 30, 1929, a cheque for Rs. 1,225 for interest. It was open to the first defendant to ask that if he was to sign a bond for Rs. 70,000, the consideration for which was to be paid by Mrs. Poulier through de Vos to Boake, that the consideration should pass to his satisfaction, and he might quite reasonably have required that Boake should be present and that the plaintiff's bond should be discharged by Boake on his signing 1 D 6. It is true that de Vos would not have given the first defendant a cheque in his favour, but if the first defendant had asked that de Vos should give him a cheque made specially payable to Boake only, it is hard to see how de Vos could have refused to do so if he was in a position to draw a cheque for that amount. A greater degree of vigilance and less trustfulness on the part of the first defendant could have prevented this fraud.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.