1916.

Present : Wood Renton C.J. and De Sampayo J.

ANDAPPA CHETTY *v.* NAYANA *et al.*

427—D. C. Colombo, 45,652.

Promissory note—Notice of dishonour—Waiver—Sending case back for further adjudication after ascertaining pinch of the case.

A person should not be held to have waived a right of which he was unaware.

Where a payee of a note promised, subsequent to the dishonour to pay the amount of the note, he cannot be taken to have waived his right to notice of dishonour, unless he was aware at the time he made his promise to the indorsee that the note had, in fact, been dishonoured.

WOOD RENTON C.J.—"It does not appear to me that it would be safe, now that a fresh pinch in the case has been ascertained, to send it back upon any terms for further inquiry and adjudication."

THE facts are set out in the judgment.

Hayley, for plaintiff, appellant.

F. M. de Saram, for third defendant, respondent.

November 21, 1916. WOOD RENTON C.J.—

This is an action by the second indorsee of a promissory note against the first and second defendants, who were its makers, the third defendant, the payee, and the fourth defendant, the first indorsee. The fourth defendant consented to judgment. The plaintiff has obtained judgment against the first and second defendants. The learned District Judge has dismissed his action against the third defendant, on the ground that the latter had not received due notice of dishonour as required by section 48 of the Bills of Exchange Act, 1882. The plaintiff appeals.

It is not disputed by Mr. Hayley, who has argued the case on his behalf, that under section 48 of the Bills of Exchange Act the third defendant was entitled to notice of dishonour. But he contends, in the first place, that the learned District Judge has wrongly decided on the facts that notice of dishonour was not given; and, in the second place, that, in any event, the third defendant had waived his right to such notice by promising to pay the amount due on the note, subsequent to its dishonour, to the plaintiff himself. Mr. Hayley has, in the last place, asked us to consider whether, should his appeal fail on the facts and on the law, the case ought not to be sent back to the District Court, even upon stringent terms as to

costs, for the framing and trial of the issue of waiver. The view taken by the learned District Judge of the evidence in support of the plaintiff's case may be summarized thus. The only witness examined for the plaintiff was the fourth defendant, who, as I have already mentioned, had consented to judgment being entered up against him. The fourth defendant said that he had, in the first place, demanded payment from the third defendant upon two separate occasions; that the third defendant put him off each time, saying that he would pay, and when he was further pressed, promised to get the money from the makers and pay the plaintiff then. The makers did not pay, and the note was dishonoured. The fourth defendant then went a third time to the third defendant, told him that he was not well and intended going to India, and asked for payment. The third defendant put him off, saying that he would pay. The learned District Judge remarks that at this juncture he himself called attention to the fact that, so far, there was no proof of notice of dishonour, and he adds that shortly afterwards the fourth defendant was asked the direct question how he knew that the first and second defendants had not paid the plaintiff, and at once replied that he had learnt that fact from the third defendant himself. The impression created on the mind of the District Judge by the fourth defendant's evidence in this matter obviously was that when the pinch of the case as to the want of notice of dishonour had been ascertained the fourth defendant proceeded to supply the gap. It is impossible for us to say that the finding of the District Judge on the facts, resting as it does on an incident of this kind which passed under his own personal observation, is erroneous.

The plaintiff did not allege in his plaint that notice of dishonour had been given to the third defendant. The point was, however, expressly taken in the answer, and at the commencement of the hearing the plaintiff's proctor moved to amend the plaint by alleging that notice of the dishonour of the note had been duly given to the third defendant. It was clearly the duty of the plaintiff at this stage, if he intended to rely on a waiver of notice, to ask that a direct issue on that point should be framed and tried. It is quite probable that had this course been adopted the third defendant would himself have come forward at the trial and given his version of the circumstances. No such issue, however, was asked for, and the case was disposed of solely on the question whether notice of dishonour had been given or not. Mr. Hayley has referred us to the provisions of section 50 (2) (*b*) of the Bills of Exchange Act, 1882, under which waiver of notice may be either express or implied, and has asked us to infer from the third defendant's promise to pay, subsequent to the dishonour of the note, that he had waived his right to notice. It is clear law, however, and equally clear good sense, that a man should not be held to have waived a right of which he is unaware, and unless it results from the evidence that the third

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defendant, at the time when he made his ultimate promise to pay the amount due on the note, was aware that the note had, in fact, been dishonoured, he was not, and could not be, in a position to say whether he would or would not take his stand on his legal right to have notice of that dishonour. It is sufficient in this connection to refer to the English cases of *Mackenzie v. Mackenzie* [1] and *Pickin v. Graham*,[2] in which the principle just cited is clearly laid down. Mr. Hayley called our attention to the decision of the Court of Common Pleas in *Cordery v. Colville*, [3] where it was held that if a drawer of a bill of exchange, after the time for giving notice of dishonour had expired, promised to pay the bill, that is a waiver of notice, and that if there is no plea of waiver, the Court will add such a plea. In that case Byles J. held that a promise to pay a bill, whether made before or after the time for giving notice has expired, is evidence that due notice has been given, that a promise to pay the bill before the time for giving notice has expired may also be used as evidence that notice has been dispensed with, and that a promise made after the time for giving notice has expired is evidence that notice has been waived. The decision in *Cordery v. Colville* [3] does not, however, in my opinion, conflict in any way with the principle laid down in the two cases just cited. The report shows that the acceptor of the bill had promised to pay at a public house kept by the defendant; that on the day on which the bill became due the plaintiff called at the defendant's public house and saw his wife; that the accepter was not present; that the plaintiff showed the bill to the defendant's wife, told her what he wanted, and then went away; and that when about two months afterwards the plaintiff and the defendant met, the latter promised to pay the bill. Upon this evidence a verdict had been given to the plaintiff. The motion in the Court of Common Pleas was a motion to set it aside. The Court refused to interfere, and it is not difficult to see that there were circumstances in the case from which a full knowledge on the part of the defendant of the acceptor's default might fairly be inferred. It does not appear to me that it would be safe, now that a fresh pinch in the case has been ascertained, to send it back upon any terms for further inquiry and adjudication. The danger, to which the District Judge has called attention, of evidence being shaped to meet a legal difficulty that has been pointed out would then present itself in an accentuated form.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

[1] *(1787) 1 Term. Rep. 716.*

[2] *(1833) 1 Cr. & M. 725.*

[3] *(1863) 32 L. J. C. P. 210.*