

1931

Present : Lyall Grant and Drieberg JJ.

CHRISTOFFELSZ v. LAWRENCE.

266—*D. C. Kandy*, 38,050.

Evidence—Action for recovery of loan by deceased—Entries made by deceased in note book—Statement against interest—Evidence Ordinance, s. 32 (2) and (3).

Where, in an action brought by the administratrix of an estate to recover money lent by the deceased, reliance was placed upon certain disconnected entries made by the latter in an account book in proof of the loan,—

Held, that the account book cannot be regarded as having been kept in the ordinary course of business within the meaning of section 32 (2) of the Evidence Ordinance.

Held further, that entry of payments made by the defendant would make the account book admissible, as containing statements against the interest of the deceased, only if they are clearly referable to the loan.

APPEAL from a judgment of the District Judge of Kandy.

Hayley, K.C. (with him *Abeyesekere*), for defendant, appellant.

R. L. Pereira, K.C. (with him *Roberts*), for plaintiff, respondent.

May 18, 1931. LYALL GRANT J.—

This is an appeal from the District Court of Kandy. The plaintiff as administratrix sued the defendant for a sum of Rs. 7,000 alleged to have been lent by her deceased brother whose estate she was administering in or about April, 1926, and for interest thereon, the total amounting to Rs. 8,227·82, and also for a separate

sum of Rs. 4,077, being the balance of money entrusted to the defendant by the deceased and still remaining in the hands of the defendant.

The plaintiff is the sister of the deceased, Mr. A. H. van Langenberg, who was a Proctor in Kandy, but appears to have retired from practice some four or five years before his death which occurred on April 4, 1928. On February 1, 1927, the deceased went into occupation of a house belonging to the defendant who was his intimate friend and they lived together under an arrangement by which the deceased paid the defendant Rs. 65 a month for rent, and the defendant paid to the deceased Rs. 30 a month for food.

The action is largely founded on a book which the administratrix found in a drawer in the deceased's office table and which she says is in the handwriting of the deceased. It is an ordinary account book. Only the first page has been filled up. It professes to be a statement of account between the deceased and the defendant.

The memorandum appears to have been begun in November, 1927, and it contains some entries extending into the early part of 1928. On the credit side, however, the first entry is one of Rs. 7,000 stated to have been lent to the defendant in 1926. Two other notebooks and a scrap of paper were also produced. The scrap of paper (P3) contained a few computations which the plaintiff deciphers as referring to interest payable to the deceased on the loan of Rs. 7,000. The notebooks are not regularly kept but are for the most part blank. Each of them, however, contain one or two entries. Apart from the entries referring to the loan of Rs. 7,000, the account book (P1) also refers to an amount due by the defendant to the deceased in September, 1927—Rs. 400 to an amount deposited with the defendant by the deceased for safe keeping on November 16, 1927, of Rs. 12,500 and to an amount deposited with the defendant on January 19, 1928,

of Rs. 1,521, totalling Rs. 14,421. Against that the account discloses that the deceased received by cheque or otherwise an amount of Rs. 10,344, leaving a balance of Rs. 4,077, which is the second sum sued for.

The defendant admits having received the sum of Rs. 12,500 from the plaintiff, but he alleges that he repaid to the deceased or expended on his behalf sums exceeding the amount received by him and he claims in reconvention a sum of Rs. 14,888·28. This is made up by sums paid partly by cheque and partly in cash, by a certain sum payable as house rent and by a sum expended for household purposes.

The issues framed were as follows:—

(1) Did the late Mr. Hugh van Langenberg lend the defendant a sum of Rs. 7,000 in April, 1926, at the rate of 12 per cent. per annum?

(2) Was there a sum of Rs. 51·90 payable as interest up to December 31, 1927?

(3) Is there a sum of Rs. 8,227·82 due on account of principal and interest to the plaintiff as administratrix from the defendant?

(4) Did the deceased deposit to the credit of the defendant's account a sum of Rs. 400?

(5) Did the defendant spend and pay out on behalf of the deceased a sum of Rs. 10,344 as set out in the schedule to the plaint or the sum of Rs. 16,663·98 as set out in schedule A of the answer?

(6) What sum if any is payable by the defendant to the plaintiff or by the deceased to the plaintiff?

(7) Was a sum of Rs. 3,842·50 paid to the deceased by the defendant in cash as set out in schedule B?

With regard to rent there is an admission by the plaintiff of Rs. 285 due to the defendant.

(8) What rent was payable by the deceased to the defendant?

(9) Was a sum of Rs. 575·78 or any portion thereof spent by the defendant as set out in schedule D?

(10) Is there a sum of Rs. 1,500 and interest due on the bond No. 1,369 of April 8, 1925, due from the deceased to the defendant ?

(11) Was a sum of Rs. 3,090 borrowed by the defendant and the deceased jointly on May 22, 1927, expended by the defendant for the use and benefit of the deceased ?

(12) Did the defendant at the request of the deceased pay out of his own funds a sum of Rs. 1,500 to Miss Elaine van Langenberg on November 12, 1927 ?

The learned District Judge answers these issues as follows :—

(1) Yes.

(2) Yes.

(3) Yes.

(4) Yes. I admit the correctness of P1 as a whole and there is no reason why I should except this item.

(5) A sum of Rs. 10,344 not Rs. 16,663.98 as alleged by the defendant.

On the 6th issue he gives judgment for the plaintiff against the defendant in the sum of Rs. 12,304.82, and for the defendant against the plaintiff in Rs. 840.75.

(7) No.

(8) Rs. 75 a month, and he finds that Rs. 325 is due by the estate to the defendant.

In regard to the 9th issue he finds that a sum of Rs. 515.75 is due, and not Rs. 575.75. He deducts Rs. 10 on account of the pyjama suit and Rs. 50 on account of motor car hire.

The 10th issue is answered in the negative, and on the 11th issue the learned District Judge finds that the money was not borrowed for the benefit of the deceased but that of the defendant. The 12th issue is answered in the negative.

The notebooks produced and admitted to be in the handwriting of the deceased can only be received in evidence if they were books kept in the ordinary course of business or alternatively if the statements in them are contrary to the interest of the person making them.

I do not think any of them can be said to be a book kept in the ordinary course of business or in the discharge of professional duty. They are private memoranda and they are not even regularly kept books relating to private affairs. They contain mere sporadic jottings.

It remains to be considered whether the contents of the books or any of them can be admitted as statements contrary to interest.

P1 is a rather informal ledger account with the defendant opening at November 18, 1927. It debits him with a sum of Rs. 7,000 "lent in 1926"—a sum of Rs. 400—balance due on current account in September, 1927. A further sum deposited in his current account at Bank, November 18, 1927, of Rs. 1,250, a sum paid on January 19, 1928, of Rs. 1,521, and a sum due as balance interest in January, 1928, on the Rs. 7,000 loan, Rs. 51.90.

All these entries are in the deceased's favour and *per se* inadmissible. On the other page however the defendant is credited with sums amounting to over Rs. 10,000 leaving a balance in favour of the deceased of Rs. 4,000 odd.

In *Witham v. Taylor*¹ an entry by a deceased person, "JW paid me three months' interest" followed by other entries pointing to a loan was held to be admissible evidence to prove a loan.

There the entry of payment of interest was in itself a declaration against interest and clearly referable to a loan. Here however the entries against interest are not clearly referable to the loan of Rs. 7,000. They stand quite independently of it.

In *Whaley v. Carlisle*² it was held that the discharging items were not so incorporated or connected with the charging entries as to render the former admissible as part of a statement against interest. That seems to me to be the effect of P1. The discharging items are not clearly referable to the loan.

¹ (1876) 3 Ch. Div. 605. ² (1867) 15 W. R. 1183.

P2 is an isolated entry in another notebook. It is short and I give it in full.

B. A. Lawrence.

Money lent Rs. on April 1, 1926.

Paid Rs. 210 as interest till June 30, 1926. On July 10, 1926.

Paid Rs. 210 as interest till September 30, 1926. On October 7, 1926.

Neither the amount of the loans nor the rate of interest is stated.

It was argued that this entry must refer to the loan of Rs. 7,000 mentioned in P1 and that it shows that the rate of interest was 12 per cent.

I do not think this isolated entry can be so interpreted.

It is not a regular account. It is not even apparent *ex facie* whether the payments were made to or by the defendant. The amount of the loan and the rate of interest are not specified.

Further, it is not linked up with P1 by any record of further payments of interest or by regular debiting of interest to the account.

On the contrary the only item of interest mentioned in P1 is a balance of Rs. 51.90 stated to be due in January, 1928, an amount difficult to reconcile with the entries in P2.

An entry on another unconnected page of the same notebook as P2 contains an entry almost in the same words as the first entry in P1, viz. :—

A/c with B. A. Lawrence as on
November 18, 1927.

Lent in 1926, Rs. 7,000

Deposited in his current
account at Bank in Sep- } Rs. 400
tember }

Deposited in his current
account at Bank on } Rs. 12,500
November 16, 1927 }

This is a separate statement clearly in the deceased's interest and is inadmissible.

I would therefore hold that the entries produced are not admissible for the purposes of proving the loan of Rs. 7,000.

The same reasoning applies to P3, and as there is no other evidence of this loan the 1st, 2nd, and 3rd issues must be answered in the negative.

The defendant admits having received the sums of Rs. 12,500 and Rs. 1,520 mentioned in P1.—He does not admit the items of Rs. 400 and this must be dis-allowed for lack of evidence.

So far as the plaintiff's causes of action are concerned, therefore, her first claim based on the alleged loan of Rs. 7,000 must fail for lack of evidence.

Her second claim succeeds to the extent of the Rs. 14,021 less Rs. 10,344, *i.e.*, to the extent of Rs. 3,677 with interest as claimed.

There remains to be considered the defendant's claim in reconvention.

The learned District Judge has allowed Rs. 325 in name of rent and a sum of Rs. 575.75 for disbursements on deceased's account, altogether Rs. 840.75. He has disallowed the claims on current account and for advances. I do not think sufficient grounds have been shown to justify us in interfering with these findings.

There remain claims (1) on a mortgage bond, (2) a promissory note, and (3) a sum paid to Miss E. van Langenberg. The last two of these were not seriously contested in appeal, and I do not think there is sufficient reason to differ from the findings in regard to them of the learned District Judge.

The mortgage bond for Rs. 1,500 perhaps merits more attention.

It is for the defendant to prove that the sum is due and continuing owing. Now in cross-examination when shown the cheque (P14) for Rs. 2,587 he admitted that it went to his credit and said "I don't know if Rs. 1,750 of this cheque was paid to me to wipe off the mortgage debt". "I don't remember, I can't say if it was in payment of the bond."

The onus of proof is on the defendant and when a claim is made against the estate of a deceased man the Court demands convincing evidence. See the

remarks of my brother in *Velupillai v. Sidembram*.¹ Here the defendant is not sure whether the sum was paid or not. It appears to me to follow that this claim on the mortgage bond must fail.

Judgment will be entered for the plaintiff in the sum of Rs. 2,836·25, made up as follows :—Rs. 14,021 less Rs. 10,344, *i.e.*, Rs. 3,767 nett on her claim less Rs. 840·75 on defendant's counter claim, leaving a nett sum of Rs. 2,836·25, with legal interest from the date of action.

The only question which remains is that of costs. The plaintiff has succeeded in part of her claim and has also been successful in resisting a heavy claim by the defendant. I think she must be allowed costs against the defendant in the lower Court.

On appeal the defendant has been substantially successful inasmuch as he has reduced the amount awarded against him by over Rs. 10,000. He must, I think, be allowed his costs of appeal.

DRIEBERG J.—I agrée.
