Present: Bertram C.J. and Ennis J.

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46—D. C. Colombo, 1,175.

Principal and agent—Goods delivered to another for sale outside Ceylon—Consignment of goods to foreign buyers—Undisclosed principal—Insolvency of agent—Action by assignee against principal for "short falls"—Election by foreign buyer to proceed against agent or undisclosed principal—Right of principal to ask for indemnity before paying assignee in insolvency.

Defendant delivered certain quantities of rubber to one Ismail for sale in England for commission. Ismail consigned the goods to English buyers without disclosing the fact that he was acting as agent for the defendant, and drew for a very high proportion of the price expected to be realized. In several cases the amount drawn for was not realized. Ismail became insolvent, and the plaintiff was appointed assignee. He sued the defendant for the recovery of the amount not realized (short falls).

Held, "If the defendant pays the amount now claimed to the plaintiff, it will not reach the English buyers. The English buyers will only recover a dividend, and they can come upon the defendant for the balance, and he may thus be compelled to pay that amount. Clearly, such a result would not be just."

It is open to the English buyers to elect to proceed either against Ismail or against the defendant, and so discharge the party not proceeded against . . . . There is only one conclusive form of election, and that is the recovery of judgment against one of the persons liable. Apart from such a judgment, the question whether an election has taken place is a question of fact . . . . The fact that the English buyers have entered proofs in the insolvency proceedings does not of itself constitute an election; but taken in conjunction with other circumstances may lead to such an inference. But in order that such an election may take place, the English buyers must be aware of the alternatives they had of proceedings against Ismail or the defendant.

"At common law, money due under a contract of indemnity could not be recovered until the debt in respect of which it was due had actually been paid. But equity allowed an order directing a fund to be set apart in advance."

THE facts are set out in the judgment.

Bawa, K.C. (with him *Canakeratne* and *Loos*), for the appellant.

Drieberg, K.C. (with him *Soertsz, Garvin* and *Navaratnam*), for the respondent.

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October 3, 1922. BERTRAM C.J.—

This is an appeal against a judgment of the District Court of Colombo in an action arising out of the insolvency of a firm of A. H. Ismail. It appears that the defendant and the firm of A. H. Ismail entered into a contract with regard to certain shipments of rubber. According to the plaintiff, who is the assignee of A. H. Ismail, that firm contracted with the defendant on the terms that the goods should be consigned by the firm for sale in England. The defendant, on the other hand, maintains that the contract was for an out and out sale of these rubber shipments to A. H. Ismail. There is thus a fundamental question of fact between the parties, and in addition to this there is a claim in reconvention by the defendant on the footing that his version of the transaction is the right one. With regard to this question of fact, the learned Judge in the Court below has found in favour of the plaintiff. An appeal has been addressed to us on this point, but I think it is perfectly clear that the learned Judge was right. We were asked to say that the version put forward by the plaintiff had not been made out, because the contract between Ismail and the defendant took place in Tamil, and the person by whom it was proved, Mr. Nelson, a person occupying a prominent position in the office of the firm, did not know Tamil. That point is no doubt good as far as it goes; but we can infer from the fact of this conversation, and from the action taken upon it, what was the nature of the contract. With one exception, to which I will refer immediately, all the plaintiff's books have been kept, and all his accounts were made up, on the supposition that the contract was for the sale of goods on consignment. The documents from time to time rendered to him by his correspondents in England all proceed upon the same assumption. The only exception is with regard to the book kept in pursuance of the Rubber Thefts Prevention Ordinance. There, by what I think is clearly an inaccuracy, the first few consignments of rubber taken by A. H. Ismail were described as having been sold. The error was very soon corrected, and thenceforward the consignments were described as received for shipment. I think we are entitled to accept the explanation of the witness Nelson on this point. I have not the smallest doubt that the terms of the contract were as contended for by the plaintiff, and I have little doubt, therefore, that the version set up by the defendant was fraudulently so set up, and that his claim in reconvention is equally dishonest. This being the finding of fact, we now come to the question of law.

The position is this: Throughout the transactions A. H. Ismail acted as the principal. He never disclosed his own principal to the defendant ; and the consignments, therefore, and the arrangements with the English buyers, proceeded upon the assumption

that they were dealing with Ismail alone. As a matter of fact, the defendant was an undisclosed principal; and on that fact being discovered the English buyers were entitled to look both to A. H. Ismail and to his undisclosed principal, the defendant.

Mr. Drieberg insists that, at this stage in the story, he is entitled at once to be indemnified by the defendant in respect of certain transactions with his English buyers. What were those transactions. As A. H. Ismail shipped the various consignments committed to him by the defendant, he drew upon his foreign buyers for a certain proportion of the price expected to be realized. As a matter of fact, he drew for a very high proportion, and in several cases the amount drawn for was not realized. There then arose certain claims referred to in the argument as short falls. A. H. Ismail became responsible to his foreign buyers for these short falls. Owing to the extraordinary laxity with which the business was carried on, no account was rendered to the defendant of these short falls until the insolvency of A. H. Ismail took place; and, as I have said, the assignee claims that the defendant is now liable to make the amount over to him, inasmuch as he is under a liability to the English buyers. There arises, however, this difficulty. It is open to the English buyers to elect to proceed either against Ismail or against the defendant, and so discharge the party not proceeded against. But it is not clear up to the present that any election has been made. If no election has been made, the defendant is in this dangerous position. If he pays the amount now claimed to the plaintiff, it will not reach the English buyers. The English buyers will only recover a dividend and they can come upon the defendant for the balance, and he may thus be compelled to pay that amount. Clearly, such a result would not be just.

With regard to the question whether the English buyers have elected, the authorities show this: There is only one conclusive form of election, and that is the recovery of judgment against one of the persons liable. The *locus classicus* for the exposition of that principle is the judgment of Lord Cairns in *Kendal v. Hamilton.*[1] Apart from such a judgment, the question whether an election has taken place is a question of fact. Now, in this case the English buyers have entered proofs in the insolvency proceedings, including these short falls, in their general account against A. H. Ismail. It is settled law that this of itself does not constitute an election. See *Curtis v. Williamson.*[2] On the other hand, the entering of such a proof may be a very strong fact, taken in conjunction with the circumstances of the case, from which a binding election may be inferred. But in order that such an election can take place, the person electing must be aware of the two alternatives before him; and we have nothing to show that, when the foreign buyers included this

[1] *(1879) 4 A. C. 514.*

[2] *(1874) L. R. 10 Q. B. 57.*

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item in their general account and claimed against A. H. Ismail, they were aware of A. H. Ismail's undisclosed principal, and realized that, instead of claiming against A. H. Ismail for a dividend only, they could recover the amount in full from the defendant, A. H. Ismail's undisclosed principal.

As we do not think it satisfactory to give a decision in these circumstances, the course we propose to take is this: To remit the case to the District Court, with a view to giving an opportunity to the English buyers to take some definite action. I think it should be the duty of the assignee, the plaintiff in this case, to notify to those English buyers the present position. If within four months from the date of this judgment the English buyers withdraw their proofs to the extent of those short falls, this will be an indication that now, knowing the facts, they propose to proceed against the defendant. If, on the other hand, they do not so withdraw their proofs, then, in view of the fact that all the circumstances are before them, and in view of the advanced state of the insolvency, I think it should be taken that they have elected to look to A. H. Ismail to meet their claim, and the defendant in that case will be discharged. If one English buyer acts in one way and one English buyer in another, each case, of course, will be dealt with on the same principle. There then arises the contingency of one or more of the English buyers electing to look to the insolvent estate of A. H. Ismail. In that case, no doubt, that estate will be entitled to indemnity of some sort against the defendant. I need not discuss this principle at length here. I would simply draw attention to two leading cases on the subject (*Lacey v. Hill* [1] and *In re Richardson* [2]).

I would further like to point out this: That the right of indemnity, which under the circumstances the assignee may have, is an equitable right. At common law, money due under a contract of indemnity could not be recovered until the debt in respect of which it was due had actually been paid. But equity allowed an order directing a fund to be set apart in advance. It is not necessary for us at this stage to give any decision of the extent of the indemnity to which the defendant will be liable if the English buyers elect to pursue their proofs against the insolvent estate. That is a matter which can be argued upon a proper issue being framed in the Court below.

The decree should be formally set aside. The plaintiff, however, in any event, will be entitled to judgment for the commission and charges incurred by A. H. Ismail as commission agent. With regard to the costs, I think the fairest order will be that there should be no order as to the costs of the appeal. With regard to costs in the Court below up to judgment, I think that in view of the defence put forward by the defendant, and in view of his claim

[1] *(1874) L. R. Eq. 191.*

[2] *(1911) 2 K B 709.*

in reconvention and the substantial part that question took in the Court below, the order of the District Judge giving costs to the plaintiff should remain undisturbed. The costs of all subsequent proceedings should, in my opinion, be in the discretion of the learned District Judge.

ENNIS J.—I agree.

Varied.