1942 *Present* : **Howard C.J. and de Kretser J.**

ISMAIL *v.* MUTTIAH CHETTIAR.

19—D. C. (Inty.) Puttalam, 4,871.

Pawn-ticket—Action to recover value of jewellery pawned—Evidence to vary terms of pawn-ticket—Pawnbroker's Ordinance (Cap. 75), s. 6.

In an action for the return of jewellery pawned with the defendant, a pawn broker, or in the alternative for the recovery of its value, it is open to the plaintiff to lead evidence to vary the terms of the pawn-ticket with regard to the value of the articles pawned.

APPEAL from a judgment of the District Judge of Puttalam.

N. E. Weerasooria, K.C. (with him *M. I. M. Haniffa*), for the plaintiff. appellant.

H. V. Perera, K.C. (with him *A. Seyed Ahamed*), for the defendant. respondent.

Cur. adv. vult.

July 15, 1942. HOWARD C.J.—

This is an appeal by the plaintiff from an order of the District Judge of Puttalam, answering a certain issue in the case in favour of the defendant and ruling that no evidence can be led to vary the terms of documents P 1 and D 1, with regard to the articles pawned. The plaintiff instituted the action to obtain an order against the defendant for the return of certain jewellery pawned with the defendant or in the alternative for the recovery of a sum of Rs. 1,000, being its value. The defendant, in his answer, whilst admitting that the articles were pawned with him, averred that they were stolen and that their value was Rs. 310, which sum exceeds the amount due to him by way of principal and interest on the loan. During the framing of the issues, the pawn-ticket, P 1, and its counterfoil, D 1, were read and received in evidence by consent. These documents gave the value of the articles pawned at Rs. 310. The appellant intended to lead evidence that the articles were in fact worth Rs. 1,009.37. It was in these circumstances that the said preliminary issue was framed as follows :—

> "Can plaintiff lead evidence to vary the terms of P 1 and D 1 with regard to the value and description of the articles pawned ?"

In accepting the defendant's contention the learned Judge stated that section 6 of the Pawnbroker's Ordinance (Cap. 75) provides that the pawn-ticket should be in the prescribed form. The form itself provides

for a statement as to the value of the articles pawned. He, therefore, held that P 1 and D 1 represent an agreement required by the law to be reduced to that particular form. Hence the law required the value of the articles pawned to be specified and the statement with regard to such value cannot be regarded as a mere recital. The learned Judge also held that, as the value of the articles pawned has been mentioned because of the requirements of the law, the entry with regard to it cannot be regarded as coming within Explanation 3 to section 91 of the Evidence Ordinance. Nor in the learned Judge's opinion could evidence be admitted under proviso (i) of section 92 to vary the terms of P 1. To sum up the conclusions of the learned Judge, he held that the contract of pawn had been reduced to the form of a writing and moreover it was matter required by law to be reduced to the form of a document. Hence, none of the exceptions being applicable, sections 91 and 92 of the Evidence Ordinance precluded the admission of the evidence sought to be led by the appellant.

In this Court, Counsel for the respondent has not supported all the findings of the District Judge. He does, however, maintain that the worth of the articles pawned is matter required by law to be reduced to the form of a document and hence, by reason of section 91, no evidence of such matter except the document itself is admissible. The illustrations to section 91 do not seem to support this contention. Moreover, the discussion on the class of cases, coming within the ambit of the words "matters required by law to be reduced to the form of a document", to be found on *pp. 599-602 of the 8th Edition of Woodroff & Ameer Ali on the Law of Evidence in British India,* does not include in this class a document such as a pawn-ticket. In this discussion, reference is made to documents relating to judicial proceedings, such as judgments and decrees in civil and criminal cases, depositions and confessions. The subject is also considered in *paragraph 399 of the 12th Edition of Taylor on Evidence.* In this paragraph, it is stated as follows :—

> "And, first, oral evidence cannot be substituted for any instruments which the law requires to be in writing, such as records, public and judicial documents, official informations or examinations, deeds of conveyance of lands, wills, other than nuncupative, acknowledgments under *Lord Tenterden's Act,* promises to pay the debt of another person, and other writings mentioned in the *Statute of Frauds.* In all these cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing exists, and is in the power of the party. Thus, for example, parol evidence is inadmissible to prove at what sittings or assizes a trial at *Nisi Prius* came on, or even that it took place at all, but the record must be produced. The date of a prisoner's committal for trial cannot be shown by parol, the warrant for committal being superior evidence. Whenever the testimony of a witness is required by law to be reduced into writing,—as, for instance, when it is taken by depositions, either before an examiner of the Court, or before a Magistrate on an indictable charge,—the writing becomes, in all subsequent proceedings, whether civil or criminal, the best

evidence of what the witness has stated, and parol proof on the subject is consequently excluded in the first instance. Accordingly, in an action for malicious prosecution, no parol evidence can be given (if objected to) of what a witness said in his evidence before the Magistrate until his deposition has first been put in. When put in, it will exclude parol evidence inconsistent with it, but parol evidence can be given to supplement the deposition by proving that the witness said something on which the deposition is silent. Moreover, parol evidence cannot be received of the statement of a prisoner before the Magistrate where the examination has, in conformity with the *Indictable Offences Act, 1848* (*c. 42*) *in England,* or the corresponding Act in Ireland been reduced into writing, and subscribed, and returned by the Justice."

The principle formulated in Taylor and in the Indian Evidence Act is the same. The law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing which is the best evidence exists. The first question that arises therefrom is whether the Pawnbrokers Ordinance required the evidence of the pawning to be in writing. Section 6 (2) provides that no article shall be or be deemed to be taken in pawn unless and until—

(*a*) the pawner has signed the counterfoil of the pawn-ticket ;

(*b*) the pawnbroker has signed the foil of the pawn-ticket and has given the foil to the pawner ; and

(*c*) the pawner has received and accepted the foil of the pawn-ticket from the pawnbroker.

Section 5 (1) imposes on the pawnbroker the duties of keeping and using in his business the forms of foil and counterfoil prescribed in Schedule I. Section 6 (1) provides that these forms, when executed, constitute the pawn-ticket. Section 5 (1) also provides that the pownbroker shall, from time to time, as occasion demands, enter in the forms in a fair and legible manner the particulars indicated in and in accordance with the direction of Schedule I and shall make all inquiries necessary for that purpose. It is obvious that these provisions are designed to protect those who have dealings with pawnbrokers. On the latter is cast the duty of filling in the particulars that appear in the foil and counterfoil. In my opinion section 6 (2) merely provides that the pawnbroker shall not be permitted to take the benefit of a contract in pawn unless he furnishes the pawner with a document containing particulars of the transaction. It is true that the form prescribed in Schedule I provides for a statement as to the "worth" of the articles pawned. But it is not stated in the Ordinance that this figure must be agreed between the pawner and pawnbroker or that such figure should form the basis of the contract between the parties. Moreover, it is a figure entered only by the pawnbroker in the foil and counterfoil after he has made inquiries. It may also be entered in a language with which the pawner may not be acquainted, as the law allows it to be entered in English, Sinhalese or Tamil. As the law provides that the "worth" of the article pawned shall be entered in the two documents,

it might be argued that the contract of pawn could not be pleaded by the pawnbroker if the latter had not made such entry. On the other hand, it does not, in my opinion, preclude the pawner who did not make the entry himself from establishing the value of the articles by evidence other than that contained in the pawn-ticket. In these circumstances, other evidence is admissible. The order of the District Judge must, therefore, be set aside and issue 4 answered in the plaintiff's favour. It is further ordered that the plaintiff is entitled to the costs of this appeal.

DE KRETSER J.—I agree.

Appeal allowed.