1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

CHARLES BAGLIN LTD., Appellant, and A. M. S. LETCHUMANAN, Respondent

S. C. 177—D. C. Colombo, 14,746/5

Bill of exchange—Acceptance—Burden of proof.

Defendant was sued on a bill of exchange on the ground that the bill was accepted by his business partner. He denied, however, (i) that his business partner accepted the bill, and (ii) that the partner had any authority to incur the debt on his behalf.

Held, that the burden was on the plaintiff to prove the partner's signature.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *John de Saram* and *N. R. M. Daluwatte*, for the plaintiff-appellant.

C. Ranganathan, with *V. K. Palasunderam*, for the 3rd defendant-respondent.

Cur. adv. vult.

August 29, 1956. T. S. FERNANDO, J.—

The plaintiff, a limited liability company incorporated in England, instituted this action under summary procedure against the 1st, 2nd and 3rd defendants who were on all the dates material to this action partners in the business called and known as Sanmugananda Oriental

Stores. Summons was served on all three defendants, but the 1st defendant did not make any application for leave to defend and file answer. The 2nd and 3rd defendants both applied for such leave and leave was accordingly granted to them on condition that each gave security in a sum of Rs. 1000. The 2nd defendant did not furnish the security and filed no answer. The 3rd defendant, the respondent on this appeal, furnished security and filed an answer in the course of which he denied certain allegations contained in the plaint, including the allegation that the defendants accepted the bill of exchange sued upon.

The plaintiff's case was that the bill of exchange sued upon was accepted by the 1st defendant, a partner of the business, by signing it and that the bill was dishonoured by non-payment on maturity. The plaintiff sought to make the 3rd defendant liable on the basis that the latter was himself a partner of the business on all material dates. The learned District Judge has held against the 3rd defendant on the question of fact whether he was a partner of the business on the material date, viz. the date of the alleged acceptance of the bill, and there was in my opinion evidence to support this finding.

The learned Judge has however held that the action as against the 3rd defendant must fail in the absence of proof that the bill was accepted by the 1st defendant. Learned counsel appearing before us for the plaintiff company has argued that, having regard to the conduct of the proceedings in this case, one could assume that all parties have tacitly waived the necessity of formal production of the bill in evidence. If by this argument was meant that formal proof of the bill was unnecessary I regret I am unable to accede to the argument. The first issue accepted by the learned District Judge was the following :—

> "Did the 1st defendant and/or the 2nd defendant and/or the 3rd defendant accept the document sued upon ?"

The burden of proving acceptance of the bill undoubtedly lay upon the plaintiff and it is strange that no effort was made on behalf of the plaintiff to discharge this burden even when the 3rd defendant gave evidence in the course of the trial. The point does not appear to have escaped the notice of plaintiff's counsel at the trial because we find that in the course of the addresses in the District Court counsel for the plaintiff appears to have contended that in the face of the contents of the 3rd defendant's affidavit tendered in connection with his application for leave to defend and file answer the burden of disproving that the signature on the bill was that of the 1st defendant was on the person denying the signature. In the affidavit referred to, the 3rd defendant has denied (i) that he accepted the bill, and (ii) that the 1st defendant had any authority to incur the debt on his behalf. I am of opinion that these denials should have made it clear to the plaintiff that there was no admission by the 3rd defendant that the 1st defendant did sign the bill. In view of this opinion and of the plaintiff's failure to lead any evidence to prove that the 1st defendant signed in acceptance, the order dismissing the plaintiff's action as against the 3rd defendant is unexceptionable.

Learned counsel for the plaintiff has referred us to certain English decisions but they all appear to me to be inapplicable to the case before us in the absence of some evidence that the bill of exchange has been signed by the person whose name appears thereon as the acceptor.

In *Royden v. Ryde*[1] it was held that in an action against the acceptor of a bill of exchange it is not necessary for the plaintiff, under ordinary circumstances, if the handwriting of the acceptor has been proved, to give evidence of his identity with the defendant on the record. In that case a witness proved (*a*) the handwriting of John Thomas Ryde, the acceptor, (*b*) that he knew John Thomas Ryde who kept an account at the bank at which he, the witness, was a clerk, and (*c*) that he knew the handwriting of John Thomas Ryde, the constituent of the bank and had often paid his cheques. The court held that there was sufficient proof of acceptance without showing that this was the same John Thomas Ryde on whom process had been served.

In *Sewell v. Evans*[2], in an action for goods sold and delivered, where the plaintiff had proved the delivery of the goods to a person bearing the name of the defendant, the handwriting of that person, in a letter to the plaintiff, acknowledging the receipt of the goods being also proved, it was held it was not necessary for the plaintiff to show, in addition, the identity of that person with the defendant on the record.

What was held in both cases referred to above was that to prove the execution by the defendant of an instrument on which he is sued, if it be shown that such instrument is executed by a person bearing the defendant's name, it is not necessary to give evidence strictly identifying the person whose signature is proved with the party upon whom process has been served unless facts appear which raise a doubt of the identity.

Two other cases which were relied on, *Murieta v. Wolfhagen*[3] and *Hamber v. Roberts*[4], are also distinguishable in that a witness did give evidence in both these cases to the effect that he believed the document to be in the handwriting of a person bearing the name of the defendant. These decisions cannot in my opinion be availed of by the appellant who made no attempt to prove that the signature on the bill was that of the 1st defendant.

The burden of establishing acceptance of the bill being upon the plaintiff, it seems to me that the contention of counsel for the respondent that the failure of the plaintiff to prove the document as required by the Evidence Ordinance disposes of his appeal is sound. In this connection I would respectfully adopt the language of Ashworth J. in the case of *Salaik Chand v. Mt. Taniz Bano*[5] that "the execution of a document cannot be deemed proved as required by the Evidence Act merely because it is proved in the sense of the definition of 'proved'. That definition of the word 'proved' must be read along with Section 67

[1] *L. J. (1843) Q. B. 276.*
[2] *L. J. (1843) Q. B. 277.*
[3] *(1849) 2 Car. & K. 744; 175 E. R. 311.*
[4] *(1849) L. J. C. P. (N. S.) 250; 137 E. R. 341.*
[5] *A. I. R. (1928) Allahabad 303 at 304.*

of the Act. That Section requires that there must be specific evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved, the Court cannot proceed to consider whether execution is proved. In other words, Section 67 (of the Evidence Act) makes proof of execution of a document something more difficult than proof of matter other than the execution of a document".

I would accordingly dismiss the plaintiff's appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.