ARNASALAM *v.* MARIKAR.

1903.
September 18.

D. C., Colombo, 15,695.

Composition deed—Action on promissory note—Delay in presenting endorsed cheque for payment.

Action by endorsee of certain promissory notes against the maker (first defendant) and endorses thereof. Plea that the second and third defendants trading together as partners endorsed the notes and delivered them to the plaintiff, and that the plaintiff having agreed with the first defendant to accept a composition at the rate of Rs. 4.75 for every Rs. 10 of his debt, the first defendant paid by cheque to plaintiff Rs. 3,075, leaving only Rs. 783 unpaid, which was still due,—

Held, that plaintiff was bound by the composition deed to which he and the firm of the second and third defendants were parties as creditors of the first defendant, and the plaintiff by acquiescing in the deed must be presumed to have agreed that the first defendant should be released altogether as regards himself, and that the first defendant's liability towards the firm of the second and third defendants should be the measure of that firm's liability to the plaintiff.

As regards the cheque for Rs. 3,075 accepted by the plaintiff in part payment of the sum due upon the composition, it was drawn on 30th November, 1900, endorsed to plaintiff on 1st December, but not presented for payment till 6th February, 1901, when it was dishonoured.

Held, that the endorsed cheque should have been promptly presented for two reasons, the first being that if the drawer suffers actual damage through the delay, as by the failure of the bank, he is discharged to the extent of such damage; and the record being that if it is not presented for payment within a reasonable time after endorsement, the endorser will be discharged.

THE plaintiff instituted this action against one S. A. L. Marikar and two others, who traded as Chittambalam, Mather & Co., for the recovery of the sum of Rs. 8,129.75, alleged to be due on seven promissory notes made by the first defendant in favour of the other two and endorsed by them and delivered to the plaintiff.

On the 21st day of October, 1901, judgment was signed against the first defendant for the full amount due on the said promissory notes.

The second defendant, Chittambalam, filed answer admitting that the said promissory notes were made in favour of the firm aforesaid, and that he had endorsed and delivered them to the plaintiff, but he pleaded that he had so endorsed the said promissory notes for the accommodation of the first defendant.

The second defendant further pleaded in his answer that the plaintiff had agreed with the first defendant to accept from the first defendant a composition at the rate of Rs. 4.75 on every Rs. 10 on his debts, and that in pursuance of the said agreement the first

1903. *September 18.*

defendant paid to the plaintiff the sum of Rs. 3,074.50, leaving a balance sum of Rs. 783 unpaid, which the second defendant admitted was due from him to the plaintiff.

The second defendant also claimed in reconvention certain sums which he alleged he had paid to the plaintiff, and which had not been repaid to him.

At the trial of the action the following issues were framed:—

(1) Did the first defendant on the 17th November, 1900, enter into a deed of composition with his creditors, including the plaintiff, whereby his creditors, including the plaintiff, agreed to accept Rs. 4.75 for every Rs. 10?

(2) In pursuance of the above agreement did the plaintiff accept a cheque for Rs. 3,074.50 in part satisfaction of the amount due on the notes sued on?

(3) Was the second defendant discharged from all liability on the notes by reason of the plaintiff entering into the deed of composition with first defendant?

(4) Were the amounts appearing in paragraph 6 of the answer deposited with the plaintiff as therein alleged, and are they still due?

The second defendant admitted that the amount of the notes sued on was included in the sum of Rs. 8,596.22 mentioned in the deed of composition as a debt due by the first defendant to the second and third defendants, and not as a debt due to the plaintiff.

The Additional District Judge held that the appellant was bound to accept the aforesaid composition on the notes sued on, and that the cheque not having been presented in time the plaintiff should suffer the loss. After giving second defendant credit for a certain sum admitted to be due to him from the plaintiff, the District Judge gave the second defendant judgment for the sum of Rs. 1,706.67 and interest and costs.

The plaintiff appealed.

Dornhorst, K.C., for plaintiff, appellant.

H. J. C. Pereira (*Wadsworth* with him), for second defendant, respondent.

18th September, 1903. MIDDLETON, J.—

This is an action by the endorsee against the maker and endorsers of seven promissory notes made by the first defendant in favour of the second and third defendants, who were partners and endorsed by them to the plaintiff. So far as I can ascertain the plea of want of consideration was not seriously insisted upon, nor could it prevail.

1903.
September 18.
MIDDLETON, J.

On the 17th November, after two of the notes became due and were dishonoured, the first defendant entered into an arrangement with some of his creditors embodied in the document D 2 produced in evidence, by which those signing it agreed for themselves, their executors, administrators, partners, and assigns to accept a composition of the debts due by the first defendant to the amount of Rs. 4.75 for every Rs. 10 in full satisfaction if paid within a period left blank, and if possible to induce all other creditors of the first defendant to do the same, and to execute a formal deed of composition. The question as to the time within which the agreement was to be performed does not appear to arise, as it seems that what was done occurred within a reasonable time.

It was agreed by counsel on both sides that no deed of composition had been executed, and that D 2 was the document upon the construction of which the rights of the parties must depend.

The plaintiff signed this document in respect of certain debts owed to him by the first defendant, other than those on the notes in question here, and the second defendant's firm, Chittambalam & Mather, also signed it in respect of the notes in question and certain other debts due by the first defendant to them.

The schedule showed the gross amounts of the debts with the composition amounts in columns opposite the names of the respective creditors, who apparently were all payees of notes given by the debtor.

The sums opposite the names of the plaintiff were Rs. 2,000, compounded for Rs. 950, and those opposite the name of the second defendant's firm were Rs. 8,596.22, compounded for Rs. 4,082.21.

The second defendant's firm admitted that included in the sum of Rs. 8,596.22 were the notes now in suit, and it was admitted that the plaintiff was paid the composition of Rs. 950.

The question for us to decide is whether the plaintiff is bound by this document so as to debar him from recovering beyond the amount of the composition agreed upon by it upon the notes now in suit.

In other words, did the plaintiff agree to release the first defendant from his liability to the extent set out in D 2 on those promissory notes which the second defendant's firm endorsed to the plaintiff?

The principle governing the construction of a composition deed, *per* Erle, J., in *Mallalieu v. Hodgson*, *16 Q B 711*, is that "each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the

1903.
September 18.
MIDDLETON, J.

insolvent in consideration of the release by him." The plaintiff knew that first defendant was indebted to him in these notes as drawer, and that second defendant's firm was so as the endorsers, and that first defendant was practically insolvent, and that he (plaintiff) must look to his endorsers for payment; he was a party to the composition deed, and must have known that the second defendant's firm was also a party.

It does not appear to be unreasonable then to assume that the plaintiff had reason to believe that included in the amount set opposite the name of the second defendant's firm was the amount of the notes for which defendant was primarily liable.

If then plaintiff had reason to believe that these notes were so included, it seems to me that he impliedly agreed that the first defendant should be released on them to the extent set out as regards the endorsers, the second defendant's firm, and the release of the principal will release the surety. *Oriental Corporation v. Overend, L. R. 7, H. L. 348 (1874).*

If, however, it is said that he did not know that they were so included, and so did not agree, he has by entering into this agreement with the other creditors induced them, including the second defendant's firm, to believe that he intended to release the first defendant's debts to him in the same way that the other creditors, including second defendant, were releasing theirs, and so caused the second defendant's firm to alter its condition in respect to its claim against the first defendant.

I think, then, that the plaintiff ought not to be heard to deny now that he did not know the notes in question were so included on the principle laid down by Lord Chancellor Campbell in *Cairncross v. Lorimer, 7, Jurist N. S. 149 (1860), i.c.*, if a party has an interest to prevent an act being done and acquiesces so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.

As a matter of fact the plaintiff has not come into the witness-box to do so.

I am further of opinion that if he had reason to believe the notes in question were included in the debt of second defendant's firm released to the extent expressed in the document D 2, that the plaintiff must be taken to have consented to release the first defendant entirely as regards himself and to have intended to look only for payment of the notes to the second defendant to the extent already indicated.

The plaintiff by his acquiescence in the document D 2 allowed the payee and endorser to appear as creditor only of the first defendant as regards the notes in suit, and in doing so I am fain to assume that he agreed that the first defendant should be released altogether as regards himself, and that first defendant's liability towards the second defendant's firm, as expressed in D 2, should be the measure of the second defendant's firm's liability to the plaintiff.

I think, then, that the plaintiff upon the proper construction of D 2 had only a right to sue the second defendant's firm to the extent of Rs. 3,857.50, which appears from the District Judge's judgment to be the amount of the composition rate on these notes.

I agree with the District Judge that he accepted the cheque for Rs. 3,074.50 X in part payment of that amount.

The next question is whether the plaintiff accepted that cheque, drawn as it was by Usoof and endorsed by the second defendant, as absolute or conditional payment.

It must be remembered that this is not an action on the cheque for Rs. 3,074.50 by the holder against endorser and drawer, but an action on the notes for which that cheque is alleged to have been given in payment.

A negotiable security as a bill or note endorsed or delivered to and taken by the creditor on account of a simple contract debt presumptively operates as conditional payment—that is, payment with the condition that it is paid when due—and that the debt revives if it is dishonoured (*Sayer v. Wagstaff, 5 Beav. 415, 13 L. J. Ch. 161*).

If the bill or note is given and taken in satisfaction and discharge of the debt, the creditor takes upon himself the risk of dishonour, and the subsequent dishonour does not revive the debt (*Sayer v. Wagstaff, ubi supra*).

Whether a bill or note is given or taken in satisfaction, or as conditional payment, is question of fact as to the intention shown by the parties (*Goldshede v Cotrell, 2 M.W. 20*).

Again, if a creditor chooses for his own convenience to take a bill, note, or other form of credit of a third party, which is offered instead of cash, it is an absolute payment in satisfaction of the debt, and he cannot upon dishonour of the security have recourse to his remedy for the debt (*Strong v. Hart, 6 B. & C. 160*).

Upon these principles the giving of a cheque on a banker, whether payable to bearer or to order, if accepted on account of a debt, is equivalent to payment, and suspends the remedy until the cheque has been presented for payment and dishonoured (*Hough v. May, 4 A. & E. 954*).

1903. *September 18.* MIDDLETON, J.

A creditor, however, taking a cheque in preference to cash does not preclude himself from resorting to his original claim upon dishonour of the cheque (*Everett v. Collins, 2 Camp. 515*).

Finally, a creditor who takes a cheque may present it for payment at any time until it is barred by the Statute of Limitation; but after a reasonable time (within the next day after receiving it) for presenting it has elapsed, he holds it at his own risk against the failure of the bank; and if the money is lost through that failure the drawer to that extent is discharged, the holder becoming creditor of the banker to the same extent (Bills of Exchange Act, 1882, section 74 ; *Robinson v. Hawksford, 9 Q. B. 52 ; Laws v. Rand, 27 L. J. C. P. 76); Leake on Contracts.*

There are two reasons why an endorsed cheque should be promptly presented, the first being that if the drawer suffers actual damage through the delay, as by the failure of the bank, he is discharged to the extent of such damage (section 74 of the Bills of Exchange Act, 1882); and secondly, that if it is not presented for payment within a reasonable time after endorsement, the endorser will be discharged (section 45 (2) Bills of Exchange Act, 1882).

In this case the plaintiff's agent received Usoof's cheque on 1st December, dated 30th November, 1900, and endorsed by the second defendant apparently without any stipulation, and it was not presented for payment till 6th February, 1901, when it was dishonoured.

Plaintiff's agent admits business dealings between plaintiff and Usoof after the receipt of the cheque, and that he used often to go to Usoof's boutique on business, but never mentioned this cheque, and says, "We looked for payment to second defendant's firm."

It is probable, I think, as the learned District Judge believes, that presentment of the cheque was delayed to favour Usoof. The holding of the cheque without presentment for payment at Usoof's bankers for so long a time goes a long way towards rebutting the presumption that it was taken as conditional payment.

The learned District Judge has given full and sufficient reasons for not believing Mather, the second defendant's partner, and Meyappa, as to the second defendant requesting the plaintiff or his agent to delay presenting the cheque for payment; and I cannot see any reason for saying he is wrong.

The conclusion I arrive at on the question of fact is that the cheque was received by the plaintiff from the second defendant as payment in cash or absolute payment, it being probably believed that even if the money was not got from the drawer it would be

possible to resort to the endorser on the cheque by action if necessary.

The second defendant gave the plaintiff a cheque endorsed to him, which the plaintiff took and treated as payment in cash.

Whether or not the drawer had funds to meet the cheque does not seem to me to be a question affecting the position of the second defendant as endorser here, unless it could be shown that he fraudulently represented that the drawer had funds. It would seem the plaintiff asked for the cheque, which he knew would be drawn by Usoof.

The plaintiff may have overlooked the provisions of section 45, sub-section (2), of the Bills of Exchange Act when he elected to treat the cheque as payment by the second defendant, and this omission on his part will probably limit his remedy on the cheque to proceedings against the drawer only.

The learned District Judge says there is no explanation as to why the second defendant wanted to give plaintiff at first a cheque for Rs. 4,083.21.

It would seem the plaintiff's agent asked for it, and as there were other outstanding accounts (apparently from the other part of the judgment in this suit unappealed against) due from the second defendant to the plaintiff, it may be that plaintiff, knowing of the exact amount the second defendant would receive under the composition deed, and of its having been paid, notified that sum as a convenient one for payment on account.

I think, therefore, that the decision of the District Judge was right, and this apeal must be dismissed with costs.

GRENIER, A.J.—I agree to dismiss this appeal.