1934 *Present :* **Garvin A.C.J. and Drieberg J.**

BENNETT *v.* DE SARAM.

359—D. C. C. Colombo, 45,854.

Mortgage bond—Failure of consideration—Money paid by lender to proctor—Misappropriated before payment to borrower—Bond executed by latter in mistaken belief—Liability of borrower.

The defendant, who owed money to K on a primary mortgage of property agreed to the suggestion of his proctor, V, that the claim should be settled with money to be borrowed from plaintiff, who on the advice of V made investments on the security of primary mortgage of landed property.

In pursuance of the said arrangement V approached the plaintiff who sent a cheque to V, who was to hold the money and pay it over on the execution of the bond in plaintiff's favour.

When the bond was signed, V handed to the defendant his own cheque, which was endorsed by the latter to V for the purpose of discharging the mortgage to K.

It was proved that at the time the cheque was drawn V had no funds in the bank to meet it and that he had appropriated to his own use the proceeds of plaintiff's cheque. In the result K's mortgage remained undischarged.

Held, that under the circumstances there was a failure of consideration on the mortgage bond.

THIS was an action to recover a sum of Rs. 22,000 with interest on a mortgage bond executed by the defendant in favour of the plaintiff on April 26, 1927. The defendant pleaded that in the circumstances set out above there was a failure of consideration. The learned District Judge dismissed the plaintiff's action.

Hayley, K.C. (with him *Choksy* and *D. W. Fernando*), for plaintiff, appellant.—de Vos had authority to receive the money from Mr. Bennett on behalf of Mr. de Saram; therefore when Mr. Bennett's money reached de Vos' hands it must be taken to have reached Mr. de Saram. The loss resulting from the fraud of de Vos must be borne by Mr. de Saram who by executing the bond sued on and paying interest on the footing that the money paid to de Vos had been received by him enabled de Vos to lull Mr. Bennett into a sense of security and prevented him from taking early steps to recover his money from de Vos. This is the principle common to the law of agency laid down by Mr. Justice Story in his book on agency :—" Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon ". The present case is on all fours with the case of *Gordon v. James* [1].

H. V. Perera (with him *Garvin* and *Gratiaen*), for first defendant, respondent.—de Vos recevied the money from Mr. Bennett as his agent for the purpose of paying it to Mr. de Saram and not as Mr. de Saram's agent. When de Vos handed Mr. de Saram his own cheque for Rs. 20,150 he represented that there were funds in his bank to meet it, but as there was only a sum of Rs. 10,549.86 to de Vos' credit there was no payment to Mr. de Saram at all. There is a general resemblance between the facts of this case and the facts of *Gordon v. James* (*supra*), but the case of *Gordon v. James* is not an easy one to follow or apply except

[1] *(1885) 30 Ch. D. 249.*

where the facts and circumstances are identical—*vide* Kay J. in *Coupe v. Collyer*[1]. This is an action for money lent and advanced and can only succeed upon proof that the money claimed had been lent and advanced. No part of Mr. Bennett's Rs. 22,000 reached Mr. de Saram as it was misappropriated by de Vos before the execution of the bond by Mr. de Saram and the handing over to him of the cheque for Rs. 20,150.

Hayley, K.C., in reply.—When payment is made by cheque the representation is not that there are sufficient funds in the bank to meet it but that it will be met when presented.

Cur. adv. vult.

January 24, 1934. GARVIN A.C.J.—

The parties to this appeal are the plaintiff who is the appellant and the first defendant who is the respondent. They have both been victimized by a proctor in whom they appear to have placed the most implicit trust. The proctor was Mr. W. A. S. de Vos. The plaintiff Mr. Bennett is a planter. He had known de Vos for several years, had acted as visiting agent of his estate Non Pareil from 1916 and had from time to time through him made investments of money on the security of the mortgage of landed property. In this way he had lent through de Vos about Rs. 175,000. He regarded de Vos as a wealthy and honourable man with whom he could trust his moneys. The respondent Mr. George de Saram was also one of de Vos' clients. He had approached de Vos to raise a loan for him in 1924 and had since then been in business relations with him. It is evident that he too reposed the utmost confidence in de Vos.

The amount raised by de Vos for Mr. de Saram was Rs. 20,000 and the lender was a Mr. Kimber. The repayment of this money was secured by a mortgage of Aturugiriya estate created by bond No. 4,261 of August 21, 1924. Early in 1927 de Vos told Mr. de Saram that Mr. Kimber was recalling the money lent by him and requested Mr. de Saram to repay the amount. Mr. de Saram was not in a position to repay the loan and de Vos told him that there was a Mr. Bennett from whom the money could be raised. Mr. de Saram assented and de Vos approached Mr. Bennett who agreed to lend Rs. 22,000. Mr. Bennett was not aware of the existence of the mortgage in favour of Mr. Kimber. He was willing to lend Rs. 22,000 on the primary mortgage of Aturugiriya estate, even as Mr. de Saram was willing to borrow the money and grant a primary mortgage over Aturugiriya to take the place of Mr. Kimber's mortgage which was to be discharged. On April 20, 1927, de Vos wrote to Mr. Bennett as follows :—

> Dear Bennett,—Since writing to you this morning I have heard from de Saram *re* loan on mortgage of Aturugiriya estate Rs. 22,000.
>
> This can also be put through now.

On April 22, Mr. Bennett sent to de Vos a cheque for Rs. 22,000 payable to de Vos receipt of which was acknowledged by de Vos' letter of April 23, 1927.

In response to a message from de Vos that the bond was ready for signature, Mr. de Saram on April 26 attended de Vos' office. De Vos put before him the bond and also a cheque drawn by him on the Hong Kong and Shanghai Bank for Rs. 20,150 which represented the difference

[1] *(1890) 62 L. T. Rep. N. S. 927 at 928 and 929.*

between Rs. 22,000 the principal sum secured by the bond and a sum of Rs. 1,850 being money due from Mr. de Saram to de Vos. The bond was duly signed by Mr. de Saram who endorsed the cheque and handed it back to de Vos who was to repay Mr. Kimber and obtain a discharge of the bond he held.

Mr. de Saram then left trusting de Vos to pay Mr. Kimber and procure a discharge of that bond. Shortly after this Mr. Bennett received from de Vos the bond executed by Mr. de Saram on April 26, and the title deeds of Aturugiriya estate which were in his possession. Thereafter Mr. de Saram ceased paying interest to Mr. Kimber but began and continued paying interest to Mr. Bennett through de Vos. At this stage Mr. Bennett's impression was that his money had been invested by de Vos on a primary mortgage of Aturugiriya estate while Mr. de Saram was led to believe that his liability to Mr. Kimber had been determined and that in lieu thereof he was now indebted to Mr. Bennett in the sum of Rs. 22,000 secured by a primary mortgage of Aturugiriya.

Mr. de Saram continued to pay interest for about a year. Towards the middle of 1928 de Vos sent for Mr. de Saram, complained that the interest payable to Bennett was in arrears and said that the principal and interest must be paid off. He suggested that Mr. de Saram should sell his house "Gulistan" in Ward place and pay off the debt. After some reflection Mr. de Saram decided to sell Gulistan and pay off the debt to Mr. Bennett and certain other debts. The sale was left in the hands of de Vos. The premises were sold on September 28, 1928, for Rs. 58,500. The consideration was left with the firm of which de Vos was the senior partner and de Vos was given instructions as to its application. It is sufficient to say that de Vos was instructed by Mr. de Saram to pay off his debt to Mr. Bennett and was trusted to carry out his instructions. Thereafter Mr. de Saram paid no more interest to Mr. Bennett in the belief that his liability to Mr. Bennett had been extinguished by payment. Indeed on October 28, 1930, Mr. de Saram again borrowed a sum of Rs. 10,000 on what he believed and intended to be a primary mortgage of Aturugiriya estate granted to the lender Daniel Dennehy. This transaction was negotiated by de Vos who attested the bond in his capacity of Notary Public. Thus Mr. de Saram was left with the impression that his liabilities to Mr. Kimber and Mr. Bennett had been discharged and that his only outstanding liability was to Mr. Dennehy. When Mr. Bennett, who had not asked for the repayment of the debt due to him and was not aware of what de Vos had done, found the interest on the bond he held falling into arrears he approached de Vos. On November 1, 1929, de Vos sent him a cheque for Rs. 1,540 in payment of interest up to September 30, 1929. He also paid him a sum of Rs. 5,000 on account of capital. These payments satisfied Mr. Bennett and assured him that everything was in order.

In 1931 de Vos was prosecuted in respect of frauds committed by him. It was then found that the sum of Rs. 22,000 entrusted to his firm by Mr. de Saram to be paid to Mr. Bennett had not been paid. De Vos had drawn a cheque for the amount. The counterfoil showed a payment to Bennett and the firm's books were written up acordingly. De Vos however admits that the cheque was made payable to himself and that

he misappropriated the money. It was also found that Mr. Kimber had not been paid and that the bond in his favour remained undischarged.

Mr. Bennett was thus left with his claim against Mr. de Saram upon a bond which was not as it purported to be a primary mortgage but which was subject to the prior mortgage in favour of Mr. Kimber. The result to Mr. de Saram was that the sum of Rs. 22,000 entrusted to de Vos for the payment of Mr. Bennett's claim save for a sum of Rs. 5,000 had been misappropriated by de Vos and that he was faced with claims by both Mr. Kimber and Mr. Bennett.

Mr. de Saram was a witness in the prosecution of de Vos and admits that he then believed he was indebted to Mr. Bennett. If all the facts and circumstances were those above narrated Mr. de Saram was right in his belief and would clearly be liable to pay Mr. Bennett's claim. But certain other facts have come to light. Mr. Bennett's cheque for Rs. 22,000 had been placed by de Vos to the credit of his personal account with the Hong Kong and Shanghai Bank on April 22, 1927. The cheque which de Vos handed to Mr. de Saram at the time of the execution of the bond in Mr. Bennett's favour was drawn on the Hong Kong and Shanghai Bank and was dated April 26, 1927. That cheque was found among de Vos' papers. It bears Mr. de Saram's endorsement but had not been passed on to Mr. Kimber or paid by the Bank.

An examination of de Vos' banking account shows that on April 26 the funds at credit only amounted to Rs. 10,549.86, an amount which was insufficient to meet a cheque for Rs. 20,150.

In these circumstances Mr. de Saram in his answer to Mr. Bennett's claim to recover the money alleged to be lent and advanced by him pleaded (*a*) failure of consideration, and alternatively (*b*) that the amount claimed had been paid.

The plea of payment depended entirely upon proof that de Vos was expressly or impliedly authorized by Mr. Bennett to receive payment. The learned District Judge held, I think rightly, that de Vos had no authority to receive payment on behalf of Mr. Bennett. He certainly was not expressly authorized by Mr. Bennett who did not instruct him to demand repayment of the money and was in complete ignorance of what de Vos had done. Indeed the proper inference from the established facts is that Mr. de Saram constituted de Vos his agent to make the payment. No such payment was made.

The one point in the case was whether there had been a failure of consideration total or partial. The learned District Judge held that there was a total failure of consideration, and from this the plaintiff Mr. Bennett appeals.

One ground upon which the appeal was pressed upon us was that de Vos had authority to receive the money from Mr. Bennett on behalf of Mr. de Saram and consequently when Mr. Bennett's money reached de Vos' hands it must be taken to have reached Mr. de Saram.

When Mr. de Saram's evidence is read as a whole it is, in my opinion, clear that all he did was to assent to de Vos' suggestion that Mr. Kimber's claim should be paid with money to be borrowed from Mr. Bennett. His authority to de Vos was to approach Mr. Bennett and ascertain whether he was prepared to lend him (de Saram) Rs. 22,000 on the primary

mortgage of Aturugiriya estate. It was not an authority to de Vos to borrow money from Mr. Bennett as Mr. de Saram's agent. Nor was Mr. Bennett under any such impression. He had from time to time invested money through de Vos. Speaking generally as to the course of business he said " I never made the cheque out in favour of the borrower, the reason being that I would require Mr. de Vos to hold it and pay it to the borrower *when I get my security—that is when I get my primary bond,* till then Mr. de Vos would hold the money. He held the money . . . . When I sent my cheque it was understood that Mr. de Vos was to hold it till the borrower gave a primary mortgage and that he was to pay off any prior encumbrances in order to give me a proper primary bond ".

These and certain other passages in the evidence given by Mr. Bennett to which reference will be made later put it beyond all doubt that in this, as in every other instance in which Mr. Bennett decided to make an investment on the security of a mortgage of property, he sent his cheque to de Vos who was to hold the fund and pay it over only at the actual execution by the borrower of the bond of mortgage. The money in de Vos' hands remained Mr. Bennett's money until it was paid over by him in exchange for the security.

The learned District Judge held that de Vos received the money from Mr. Bennett as his agent for the purpose of paying it to Mr. de Saram and not as Mr. de Saram's agent. The evidence and the inference from that evidence appear to me to point to the conclusion that the District Judge was right.

Inasmuch as he signed the bond the burden of proving failure of consideration total or partial is on the first defendant, Mr. de Saram. The amount Mr. Bennett claims to have lent Mr. de Saram is Rs. 22,000. de Vos in whose hands that money had been placed handed Mr. de Saram his own cheque for Rs. 20,150 being the balance after deducting from the principal sum an amount of Rs. 1,850 which was due to him from Mr. de Saram. He represented thereby that there were funds in the Hong Kong and Shanghai Bank—the Bank on which that cheque was drawn—to meet the cheque. Had that cheque been presented payment would have been refused for want of funds as at that date the balance to de Vos' credit was only Rs. 10,549.86. Since this was the account to the credit of which de Vos paid in Mr. Bennett's cheque it is obvious that he had already appropriated for his own purposes a considerable part of the money entrusted to him.

Indeed, de Vos admits that he placed Mr. Bennett's cheque to his credit and drew against it for his own purposes. Even Mr. Bennett after an examination of de Vos' banking account felt compelled to say, " Now I find that Mr. de Vos appropriated my money before the bond was signed ". He meant of course a part of his money.

How is it possible in these circumstances to hold that Mr. Bennett through de Vos paid Mr. de Saram Rs. 22,000 when all that was left of Mr. Bennett's money to meet the cheque for Rs. 20,150 was a sum of Rs. 10,549.86? It should here be noted that de Vos had at the time drawn a further cheque for Rs. 809 on the same account which reduced the funds over which he had control to Rs. 9,740.86. It is proved beyond doubt that de Vos could not and did not pay Mr. de Saram—if indeed he

paid him anything at all—any larger sum than Rs. 9,740.86 over and above the sum of Rs. 1,850 which was set off against Mr. de Saram's debt to him.

The method of payment adopted by de Vos was to hand Mr. de Saram his cheque for Rs. 20,150 which purported to be the equivalent in cash of Rs. 20,150. There were no funds to meet that cheque, so that what Mr. de Saram received was a worthless piece of paper while the balance of Mr. Bennett's money remained lying to de Vos' credit at the Bank. This sum is shown by the statement 1 D7 to have been drawn out and appropriated by de Vos in the next few days.

The whole of Mr. Bennett's money has thus been shown to have been appropriated by de Vos. Mr. de Saram received nothing beyond the cancellation of his debt of Rs. 1,850 to de Vos.

In these circumstances how can Mr. Bennett claim to recover on the footing that he lent and advanced Rs. 22,000 to Mr. de Saram? Mr. Bennett's action must fail unless Mr. de Saram is by estoppel or on some other principle denied the benefit of his plea of failure of consideration.

No estoppel was pleaded and no issue of estoppel was raised at the trial. Nor was it urged in appeal that there were facts which raised an estoppel as known to our law. But it was argued that in all the circumstances of this case the loss resulting from the fraud of de Vos must be borne by Mr. de Saram who it was urged by executing this bond and paying interest on the footing that the money entrusted to de Vos had been received by him enabled de Vos to lull Bennett into a sense of security but for which he would have taken early steps to recover his money from de Vos.

It was sought to support this argument by reference to the case of *Gordon v. James*[1]. There is a general resemblance between the facts of the two cases. But *Gordon v. James* (*supra*) is not an easy case to follow or apply except where the facts and circumstances are identical—*vide* Kay J. in *Coupe v. Collyer*[2]. *Gordon v. James* (*supra*) was the case of an English mortgage which had been passed by transfer to James who had previously paid £1,000, the consideration therefor into the hands of Dodge, the Solicitor for Gordon. Dodge obtained the transfer by a deception practised on Gordon and handed it to James. Over four years later Dodge became bankrupt and the money was lost. Gordon then brought action against James claiming a lien in the nature of a vendor's lien over the property conveyed by way of mortgage for the sum of £1,000. The judgment of the Court of Appeal was that James was entitled to set up against Gordon's equity as unpaid vendor an equity arising from the circumstances above referred to—*i.e.*, that Gordon by his negligent failure to make any inquiry of Dodge to whom he had entrusted the deeds induced James to believe that the £1,000 had reached him and to remain in that belief for five years to the prejudice of his interests.

The case before us is not an action for equitable relief. It is an action for money lent and advanced and as such can only, it seems to me, succeed upon proof that the money claimed had been lent and advanced. The evidence shows that the plaintiff's agent did not pay the defendant Rs. 22,000 and that the defendant received no money or other benefit by

[1] *(1885) 30 Ch. D. 249.*

[2] *(1890) 62 L. T. Rep. N. S. 927, at pp. 928 and 929.*

the transaction except to the extent of Rs. 1,850 being the amount of his debt to de Vos (the agent) which was discharged. Upon what principle is it possible to compel the defendant to make good to the plaintiff the equivalent of the money misappropriated by de Vos to whom the plaintiff had entrusted the same for payment to Mr. de Saram?

Reference was made to the principle referred to by Story in his work on agency as a maxim of natural justice " that he who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him ". This maxim is mentioned by Story when dealing with the liability of a principal for the acts of his agent notwithstanding that such acts were done in breach of private instructions to the agent limiting his authority. In the application of this principle it must be remembered that it is a part of the law of agency. It has been proved in the case before us that Mr. Bennett placed Rs. 22,000 in de Vos' hands to be paid by him to Mr. de Saram in exchange for a primary mortgage of Aturugiriya estate. It has also been proved that more than half that amount had been misappropriated by de Vos before he obtained a bond from Mr. de Saram. How is it possible to say that so far in the history of this case de Vos was enabled to defraud Mr. Bennett by anything Mr. de Saram had done? Moreover Mr. de Saram signed the bond in the belief that he had received the consideration. But it is now apparent that de Vos who was Mr. Bennett's agent for the purpose of payment passed off a worthless cheque on Mr. de Saram and thereby obtained his signature. In these circumstances the maxim referred to earlier cannot be made the foundation for an action by Mr. Bennett to recover from Mr. de Saram money which his agent never lent to Mr. de Saram and which Mr. de Saram never received even though that agent contrived by a pretence of payment to obtain his signature to a bond acknowledging receipt of the money. But for the confidence reposed in de Vos by Mr. de Saram who assumed that de Vos had, as he had undertaken to do, obtained a discharge of Mr. Kimber's bond this fraud might have come to light earlier, in which case Mr. Bennett might possibly have been able to recover from de Vos and Mr. de Saram would certainly have been saved the loss of money left in de Vos' hands out of the proceeds sale of Gulistan to be paid to Mr. Bennett. But before a person can claim the benefit of the maxim he must show that Mr. de Saram had enabled de Vos to do an act which caused him loss or injury. Mr. Bennett's loss was sustained at the hands of his agent de Vos in whom he had confidence and to whom he had entrusted the money and was not induced by the act of any person whom Mr. de Saram had placed in a position to do the act from which the injury was sustained. Indeed it was Mr. de Saram who was the victim of the fraud of Mr. Bennett's agent whereby he was induced to sign a bond for a consideration which he had never in fact received.

I have dealt above with the principal points argued to us in appeal, but no authority was cited nor any clear principle enunciated for the proposition that, apart from estoppel, an action for money lent where as a fact the money was not paid to and did not reach the borrower can succeed.

There is an aspect of the case which has not as yet been noticed. Mr. de Saram did benefit by this transaction to the extent of Rs. 1,850 being the amount of his debt to de Vos. It was urged that the District Judge should in any event have given the plaintiff judgment for that amount. But the evidence shows that de Vos who had received Rs. 22,000 out of the proceeds sale of Mr. de Saram's property, Gulistan, did pay Mr. Bennett Rs. 5,000. If therefore Mr. de Saram was liable to Mr. Bennett in the amount of Rs. 1,850 the latter has received Rs. 5,000 of Mr. de Saram's money. Had a cross appeal been entered it might have been necessary to go more fully into the state of the account between them on the basis of our finding on the points at issue. But no such appeal has been entered.

I would therefore merely affirm this judgment and dismiss this appeal with costs.

DRIEBERG J.—

The decisive issue in this case is whether there was a failure of consideration, total or partial, on the bond in favour of the plaintiff.

In the petition of appeal the point was raised that the first defendant, Mr. de Saram, was estopped by his conduct and by his signature on the bond from pleading a failure of consideration. This was not put forward by counsel at the hearing of the appeal. The English law of estoppel by deed does not prevail in Ceylon: *Ukku v. Rankiri*[1] in which the difference between a Ceylon deed and a writing under seal in England is noted. There is nothing here to prevent a debtor who has in a bond admitted the receipt of consideration from proving that he did not in fact receive that consideration (*Thoongappa Chetty v. Tikiri*[2]).

Of the Rs. 22,000 given by the plaintiff to de Vos the first defendant received only a sum of Rs. 1,850; the balance sum of Rs. 20,150 was not applied by de Vos in paying off Mr. Kimber nor was it paid to the first defendant, unless the passing of the cheque for that sum to him by de Vos at the execution of the bond can be regarded as payment. In my opinion it is not possible in the circumstances under which the cheque was passed to regard it as a payment. The plaintiff said that it was understood between him and de Vos that he was lending the money on a primary mortgage as in the case of his previous investments on mortgage of land which were put through by de Vos. He said he would not have issued a cheque in favour of the borrower because he looked to de Vos to hold the money and only pay it when he got his security, a primary mortgage, and that it was de Vos' duty to see that existing encumbrances were discharged. De Vos formed the same opinion of his obligations to the plaintiff. He said it was his duty to see that the plaintiff got a primary mortgage and that "would involve my paying off the prior mortgage". He regarded it as his duty to the plaintiff, he said, to keep the money for this purpose and that if de Saram had asked him for the cheque he would not have given it to him, by which I understand him to mean that he would not have let him have control of the cheque. It follows therefore that before the bond was signed de Vos was under a

[1] (*1908*) *11 N. L. R. 212.*

[2] *Ramanathan 1863-1868, p. 1.*

mandate from the plaintiff, implied in the circumstances and accepted by him, to hold the plaintiff's money and himself pay what was needed to ensure the bond in favour of the plaintiff being a primary one.

No question can arise of the first defendant's liability to the plaintiff until he signed the bond. One contention of the appellant was that de Vos was the first defendant's agent to obtain the Rs. 22,000 and that the first defendant became liable to the plaintiff on the payment by the plaintiff of the money to de Vos. I do not think this view is a possible one, for it is opposed to the facts. The first defendant did not give de Vos a general mandate to get him the money but to find him a lender who would give him Rs. 22,000 on his executing a bond, but if this contention is right the first defendant would be liable to the plaintiff even if he had not executed a bond.

It is contended that the liability of Mr. de Saram for the Rs. 20,150, in excess of the sum of Rs. 1,850 which he received, follows on his taking de Vos' cheque for that amount, endorsing it, and handing it back to de Vos at the execution of the bond—that what he did was to accept Rs. 20,150 from the plaintiff through the plaintiff's agent de Vos and that he thereafter gave the money to de Vos as his agent to pay off Mr. Kimber. But this can only be if there was a real payment to the first defendant. What de Vos should have done, if he was acting honestly and following the usual notarial practice, was to have stated in the attestation that of the consideration Rs. 1,850 was paid to the borrower and that Rs. 20,150 was retained for the payment of Kimber's bond. This is in fact what he did do with the money though he stated in the attestation that the whole consideration passed to the first defendant. If the attestation was so drawn it might have attracted the attention of the plaintiff, who would no doubt have then asked for proof that the Rs. 20,150 had been paid to Mr. Kimber, and if de Vos had misappropriated the money and not paid Mr. Kimber, Mr. de Saram would not be liable. He therefore certified that the whole consideration was paid to the first defendant and for that purpose passed him his cheque for Rs. 20,150, against which he had not sufficient funds at the time and which, as he says, he would not have allowed him to keep as that would have been a breach of his duty to the plaintiff. The first defendant said that de Vos gave him the cheque for Rs. 20,150, asked him to endorse it, and took it back at once telling him that he had instructions from the plaintiff that he should use the money to pay off the existing mortgage. In making, or rather affecting to make, this payment, de Vos must be regarded as acting as the agent of the plaintiff, but the payment was fictitious. It cannot be said that, on the passing of the cheque in this manner by his agent de Vos, the plaintiff discharged the obligation of payment which followed on the first defendant signing the bond and that de Vos thereafter, on taking the cheque back from the first defendant, became his agent for the purpose of payment to Mr. Kimber. In consenting to de Vos retaining Rs. 20,150 for this purpose and impliedly directing him to pay the Kimber mortgage with it, a relation of agency was created between them. But this does not mean that de Vos had discharged his mandate from the plaintiff and undertaken a new one from the first defendant. The first defendant did nothing more than assent to de Vos

carrying out what he said were his instructions from the plaintiff that is, to retain the money and pay off the existing mortgage ; in other words, he agreed that the consideration for his acknowledgment of liability should be the payment and discharge by the plaintiff, through his agent de Vos, of his liability to Mr. Kimber with the money which still continued to be the plaintiffs and which it was intended should remain with the plaintiff's agent de Vos until payment to Mr. Kimber. De Saram could have had consideration to the extent of Rs. 20,150 only if that sum was paid to Mr. Kimber, and it was not.

If, as I think, the plaintiff's obligation to the first defendant was not discharged by the passing of the cheque to him, it does not matter whether de Vos at the time had or had not money in his account to meet it.

Mr. de Saram had however received consideration from the plaintiff to the extent of Rs. 1,850. He had accepted de Vos' statement that that sum was applied to the discharge of his liability for arrears of interest and certain charges and expenses. Mr. de Saram in his answer denied that he had received any consideration on the bond, and in the alternative he pleaded that if he had, his obligation to the plaintiff was discharged by his payment to him through his agent de Vos of Rs. 22,000 from the proceeds of the sale of Gulistan. The learned District Judge has held, I think rightly, that de Vos did not receive that sum from the first defendant as the agent of the plaintiff. But de Vos did pay to the plaintiff a sum of Rs. 5,000 for which the plaintiff gives him credit. Interest on the Rs. 1,850 from date of execution April 26, 1927, to the filing of the action on August 28, 1931, at 7 per cent. would amount to Rs. 561.79. Interest was paid by de Vos to the plaintiff on Rs. 22,000 up to September 30, 1929 ; the payment of Rs. 5,000 was on December 30, 1930. If the first defendant was liable on the bond to the extent of Rs. 1,850 only, he has paid to the plaintiff more than he was obliged to pay, but it is not possible to say precisely to what extent, for questions may arise regarding the right of the first defendant to credit for all the payments made to de Vos on account of interest and even as regards the payment of Rs. 5,000 towards capital, whether the first defendant can take credit for anything more of that sum than was due in respect of Rs. 1,850 principal and interest. We were not asked to reserve to the first defendant the right to sue for the excess, and it is not therefore necessary to do more than dismiss the plaintiff's claim.

I agree that the appeal be dismissed with costs.

Appeal dismissed.