1961 *Present :* **Basnayake, C.J., and H. N. G. Fernando, J.**

H. A. CHARLES PERERA and another, Appellants, *and* M. L. MOTHA and another, Respondents

S. C. 268/1959—D. C. Colombo, 5293/MB

Handwriting—Opinion of expert—Weight—Evidence Ordinance, ss. 5, 45, 47, 59.

The evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting in question. The expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion.

Mortgage—Bond given to secure future debts—Promissory note given thereafter in respect of pre-existing debts—Incapacity of payee to sue upon the bond.

When a mortgage bond is executed as security for the payment of money which will fall due on promissory notes to be given in respect of debts which may be incurred in future, after the execution of the bond, a hypothecary action does not lie on the bond in respect of promissory notes given after the date of the bond but in substitution for debts already due from the mortgagor to the mortgagee prior to the execution of the bond.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *W. D. Gunasekera* and *H. E. P. Cooray*, for defendants-appellants.

S. Nadesan, Q.C., with *C. Ranganathan* and *M. Shanmugalingam*, for plaintiffs-respondents.

Cur. adv. vult.

March 24, 1961. BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother. I am in entire agreement with him. But I wish to add one word to what he has said on the subject of the correct approach to the evidence of experts.

Under our law (Evidence Ordinance, s. 5) " Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others. "

Opinions of persons as to the identity or genuineness of handwriting are declared to be relevant facts by sections 45 and 47 of the Evidence Ordinance. The former section declares that the opinions as to identity or genuineness of handwriting of persons specially skilled in such questions are relevant facts, while the latter section declares that the opinion of any person acquainted with the handwriting of another that it was written or signed by that other is a relevant fact. In practice the class of persons whose opinions are declared to be relevant under section 45 are described " experts ". As we are here concerned with the opinion of an " expert " on handwriting I shall confine what I have to say to the opinions of " experts " on handwriting. In the first place for the opinion of an " expert " on handwriting on the question of the identity or genuineness of handwriting to be a relevant fact in a given case, it should be one in which the Court is called upon to form an opinion as to the identity or genuineness of handwriting. Secondly the person who gives oral evidence as to the identity or genuineness of handwriting must be one who is specially skilled in questions as to the identity or genuineness of handwriting. Whether he is a person specially skilled in such questions is a question of fact to be decided by the Court. If he is not such a person his opinion would not be a relevant fact in the case.

The fact which is declared to be relevant by section 45 stands in the same position as any other relevant fact which the Court has to take into consideration in forming its opinion as to the identity or genuineness of the handwriting in question. It is important to remember that it is the Court that is called upon to decide the question of identity or genuineness of handwriting and not the " expert " . The expert's opinion is only a relevant fact to be taken into account in forming the opinion of the Court. Cases which have come up before us in appeal indicate a tendency on the part of Judges to regard the opinion of persons who describe themselves as handwriting experts as conclusive on the question of identity or genuineness of handwriting and not merely as a relevant fact, like any other such fact, to be taken into account in arriving at the Court's opinion as to the identity or genuineness of the handwriting in question. A Court should guard against that tendency. The duty of forming the opinion as to the identity or genuineness of the handwriting is on the Court and the Court alone. The expert's opinion on the points of identity or genuineness of the writing is a relevant fact in forming its

opinion. The weight to be attached to such a fact would depend on the circumstances of each case. The standing of the expert, his skill and experience, the amount and nature of the materials available for comparison, the care and discrimination with which he has approached the question on which he is expressing his opinion, the extent to which he has called in aid the advances of modern science to demonstrate to the Court the soundness of his opinion, are all matters which will assist the Court in assessing the weight to be attached to the fact of his opinion. The cross-examination of the "expert" by the opposing side, where it is properly directed, would also assist the Court in determining what weight it should attach to the fact declared relevant by section 45. In the instant case the Court was called upon to form an opinion as to the genuineness of the signatures on documents X5 and X6. The Assistant Government Examiner of Questioned Documents, who was called by the plaintiff, stated that he had before him 14 documents signed by the 1st defendant alone and 4 documents signed by both defendants. He expressed the opinion that the documents X5 and X6 had been signed by the 1st defendant. He did not explain how he reached his conclusion although he had made photographic enlargements of the signatures. The Court was therefore not afforded any assistance in performing its function of determining the genuineness of the signatures in question. An "expert" should endeavour to assist the Court by explaining the processes by which he reaches his conclusion and by giving the reasons for it; he should not be content with merely expressing his opinion. Both defendants on oath impugned the signatures in question. Now the learned District Judge, instead of treating the opinion of the Assistant Government Examiner of Questioned Documents merely as a relevant fact which fell to be considered along with the other relevant facts in forming his opinion as to the genuineness or otherwise of the signatures in question, treated it as conclusive of the dispute without forming an opinion himself as to the genuineness or otherwise of the signatures as he should have. He says :

> "The 1st defendant denies his signature on the promissory note marked X3. The evidence of the handwriting expert called by the plaintiff proves beyond any doubt that the signature on this promissory note is that of the 1st defendant. The two defendants have also denied their signatures on the two promissory notes X5 and X6 on which the plaintiffs base their claim in this action. Again the evidence of the handwriting expert leaves no room for doubt whatsoever that at least the signature of the 1st defendant appears on these two notes."

It would appear from the words I have quoted that the learned Judge's approach to the opinion of the Assistant Government Examiner of Questioned Documents was wrong. He treated it not as a relevant fact but as conclusive of the fact of genuineness of handwriting.

I wish also to advert to an incidental matter. The Assistant Government Examiner of Questioned Documents in the course of giving evidence produced a report marked X20. He said :

> " I produce my report marked X20 and the enlarged photographs of these signatures marked X21. I photographed and developed these photographs. This is a report sent by me on a commission issued by Court. This report is signed by two examiners which is a practice customary in our Department. The other examiner also examined and signed the report after having agreed with me. "

All facts except the contents of documents must be proved by cral evidence (s. 59). The report which the witness produced is neither oral nor documentary evidence. It is a record of the testimony he proposed to give in Court. Our Evidence Ordinance does not sanction a procedure by which a witness who gives oral evidence may reduce to writing his views on the matter on which he is called to give oral evidence and produce the writing at the end of his examination-in-chief. What is worse is that in the instant case the witness claimed that the writing he tendered to the Court contained not his views alone but also those of another, who was not called by either side as a witness.

H. N. G. FERNANDO, J.—

By a Mortgage Bond dated 30th July 1953 the two defendants, husband and wife, bound themselves to the plaintiff Firm, consisting of two partners, in the sum of Rs. 100,000, and hypothecated certain properties for securing the payment to the firm of " all sums of moneys payable as specified in the Recitals hereto, or under or by virtue or in respect of these presents ".

The first of the Recitals is that " the Obligors ", (the defendants), " have requested the said Obligees to supply us on credit with the products manufactured by the said Obligees to lend and advance moneys to us the said Obligors upon cheques, I. O. U. chits promissory notes made or endorsed by us the said Obligors or any of them . . . . in the aggregate to the extent of a sum at the discretion of the said Obligees and the said Obligees agreed to do so upon our entering into and granting this security unto the said Obligees ". The next Recital was that the Obligors had requested the Obligees to " allow us the use of their motor lorries and vans fully described in the second schedule for the sale and distribution of the products manufactured by the Obligees and they the said Obligees have agreed to give us the said Obligors the use of their lorries and vans fully described in the second schedule hereto upon our entering into and executing these presents and agreeing to be responsible for all damages by accident and use other than those covered by the Insurance Policies in respect of such vehicles entrusted to our care by the said Obligees such damages to be incurred hereafter being also part of this security Bond and shall be covered by this Bond and

security ". Thereafter in the Bond the parties agreed that the total extent of the security and liability in their aggregate upon the Bond shall be Rs. 100,000.

The plaint in this action refers firstly to the relevant provisions of the Bond and thereafter contains in paragraph 6 the following averment:

> " In pursuance of the said Bond the defendants became indebted to the plaintiffs in a sum of Rs. 39261/71 on promissory note dated 1st August 1953 and in a sum of Rs. 47987/- on promissory note dated 1st August 1953 respectively marked P2 and P3."

Alleging that the sum of Rs. 87,000/- odd has not been paid, the plaint prays for judgment in the said sum with interest and a hypothecary decree for the sale of the properties mortgaged by the Bond.

The defendants pleaded and alleged in their answer that neither of them had signed the promissory notes and on that account denied liability. The learned District Judge rejected this defence, and, holding that the 1st defendant had at any rate signed the promissory notes, has entered judgment in favour of the plaintiffs.

The first issue framed on behalf of the plaintiffs was : " What amount is due to the plaintiffs on the security Bond No. 1871 dated 30.7.53 attested by K. Rasanathan and the two promissory notes both dated 1.8.53 ?". Having regard to the terms of the Mortgage Bond which have been set out above, the hypothecation was for the purpose of securing the payment *of all sums of money payable as specified in the Recitals hereto*. There are only two Recitals, the first being that the Obligors have requested the *Obligees to supply them on credit with products*, and *to lend and advance moneys to them*, and *that the Obligees had agreed to do so*. The second Recital relates to the motor vehicles and concludes by stating that *damages to be incurred hereafter* (to the vehicles) shall be covered by the Bond. In these circumstances counsel for the plaintiffs in appeal could not attempt to argue that the Bond was anything but a security for the payment of debts which may be incurred by the defendants after its execution and damages to the vehicles which may occur thereafter. In so far as promissory notes are contemplated, the Bond covered liability only on notes which may be given for credits or loans or advances made after 30th July 1953.

The evidence given by the 2nd plaintiff at the trial constitutes a perfectly clear version of the circumstances in which the two promissory notes were alleged to have been executed. In brief, that version was that the 1st defendant had borrowed money from the 2nd plaintiff and also had for a considerable period been obtaining goods on credit, that the debt owing by the 1st defendant on this account was represented by a number of I.O.U. chits and promissory notes which he had signed from time to time, and that at the time of the execution of the Bond the total liability on this score represented the aggregate of the two amounts specified in the promissory notes. Very shortly after the execution

of the Bond (in fact only a day or two later) the amount of the outstanding debt was ascertained by reference to the various documents and in respect of the full debt then due the defendants on 1st August 1953 signed the two promissory notes referred to in the plaint. The 2nd plaintiff said that these debts were due to him personally because the Firm was not able to give the credit but that circumstance is not relevant for present purposes. What is important and indeed decisive is that the two promissory notes, if they were in fact executed by the defendants, were in reality substitutes for a number of I.O.U. chits and promissory notes upon which the 1st defendant had previously become liable, but were not given by the defendants in circumstances contemplated in the Mortgage Bond, namely in consideration of credits, loans or advances made to the defendants or either of them after the execution of the Bond. Apart from the 2nd plaintiff's evidence as to the actual circumstances in which the notes came to be executed there was also at the trial his expression of opinion that the Bond was a floating Bond, which ordinarily at any rate, is intended to secure future debts. If in fact this was not so, and the object of taking the Bond was to obtain covering security for an alleged existing debt of so large an amount as Rs. 87,000/-, it was most unfortunate for the 2nd plaintiff that the Bond is in a form quite irreconcilable with such an object.

The first issue framed at the trial placed upon the plaintiffs the burden of proving that the sums specified in the promissory notes fell due on the Bond of 30th July 1953. Since according to the 2nd plaintiff the notes were executed in consideration not of a transaction contemplated in the Bond but instead of a pre-existing liability due to the 1st plaintiff alone the amounts so specified cannot be said to be due on the Bond.

The legal position I have just been considering passed unnoticed by the learned trial Judge and perhaps also by counsel who appeared for the defendants, but as Mr. H. V. Perera argued it is perfectly in order to consider this question at the stage of appeal. Plaintiffs had to satisfy the Court that the promissory notes were executed in consideration of transactions contemplated in the Bond. This the plaintiffs could do by giving evidence of the circumstances in which the notes came to be executed. The plaintiffs cannot now complain that they would have testified to an entirely different set of facts if they had realised the precise point which issue No. 1 required them to establish. In such a situation the learned trial Judge should have dismissed the action without calling for a defence because the cause of action relied on was a liability on the Bond and not the liability on the notes. That which he should have done at that stage it is the duty of this Court now to do. Counsel for the plaintiffs did not invite us to hold that if the plaintiffs are not entitled to a hypothecary decree they are at least entitled to a money decree in respect of the notes. Nevertheless it seems desirable to consider the correctness of the learned District Judge's finding of fact that the 1st defendant executed the two promissory notes dated 1st August 1953. His reasons for that finding are based partly upon an examination of the

terms of the Mortgage Bond itself, partly on the evidence of the handwriting expert and partly on his belief of the evidence given by the 2nd plaintiff.

He says that it is absurd for the defendants to contend that they gave this Mortgage Bond solely for the purposes of securing the motor vehicles that were entrusted to them. This statement of the learned Judge is factually incorrect because the 1st defendant's evidence was that after executing the Bond he did obtain goods on credit; that in fact he had been sued upon a promissory note dated 17 August, 1954 for a sum of Rs. 19,000/- odd plus interest and had consented to judgment. His position was that the Bond was intended to cover and did in fact cover future credits and constituted in addition a security in respect of the entrustment to him of the motor vehicles belonging to the plaintiffs. There is little doubt that the value of the vehicles must have been about Rs. 50,000/- or more, so that in respect of half at least of the penal sum of Rs. 100,000/- specified in the Bond, it was in my opinion quite reasonable for the defendants to maintain that the Bond was executed partly in consideration of the defendants' liability at some stage to restore possession of the vehicles and to repair any damage mentioned in the Bond.

The learned Judge then states that it is absurd to contend that the defendants owed no moneys to the plaintiffs at the time of the execution of the Bond. His only reason for this opinion is that the document X22 dated 11th December 1951 shows that a sum of Rs. 43,000/- odd less commissions amounting to Rs. 16,000/, i.e. a sum of Rs. 27,000/- was due to the plaintiffs at that date. I am unable to see how the fact that Rs. 27,000/ was due at the end of 1951 serves to prove that a debt of Rs. 87,000/ must have been due in August 1953. X22 itself demonstrates that in five months the 1st defendant earned a commission of over Rs. 16,000/. The chance that the debt would become reduced and not increased was at least even. Moreover the learned Judge failed to give any weight to the significant circumstance that the Bond made no mention of any pre-existing debt. If indeed it were true that the principal purpose of the Bond of 30th July 1953 for a sum of Rs. 100,000/ was in order to secure cover for a pre-existing debt of Rs. 87,000/, it is in my opinion most surprising that this most important object was not referred to in the Bond. Surely if that was the object, the normal and reasonable course would have been to ascertain the total liability prior to 30th July 1953 and to cause it to be covered by the terms of the Bond or at least to state in the Bond that such ascertainment would take place after execution.

In regard to the evidence of the handwriting expert, I do not think it was approached in the correct manner by the learned Judge. He states that that evidence " leaves no room for doubt whatsoever that at least the signature of the 1st defendant appears on these two notes ". In other words he regards the signature as being proved purely because of the opinion of the expert. This approach does not accord with section 45 of the Evidence Ordinance whereby the expert's opinion is relevant

but only in order to enable the Judge himself to form his own opinion. The correct approach is referred to in the Privy Council decision in *Wakeford v. Lincoln (Bishop)* [1].

> " The expert called for the prosecution gave his evidence with great candour. " It is not possible," he says, " to say definitely that anybody wrote a particular thing. All you can do is to point out the similarities and draw conclusions from them ". This is the manner in which expert evidence on matters of this kind ought to be presented to the Court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of these matters, whether a particular writing is to be assigned to a particular person. Questions depending upon handwriting are in many cases doubtful, and in the past have given, and in the future will give, cause for great anxiety in courts of justice ".

Reference to the proper approach was made recently by Sinnetamby, J. in *Gratiaen Perera v The Queen* [2]:

> " I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct, provided of course the Court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery.
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> " The Judges of our Courts as well as of the Indian Courts, have made it clear that it is the function of the Court, with the assistance of an expert, to decide on the similarity of handwriting, and that it is not proper to act solely on the opinion of the expert."

In considering whether the 1st defendant signed the notes, the question whether the signature alleged to be that of the 2nd defendant was itself genuine was highly relevant. As to this the learned District Judge thought it was " unfortunate that sample signatures of the 2nd defendant were not available to the handwriting expert to express an opinion ". Here again he lost sight of the fact that sample signatures were in fact available to the plaintiffs : there were the admittedly genuine signatures of the 2nd defendant on the Mortgage Bond and on the Proxy filed in the action. What was unfortunate to my mind was that the plaintiffs did not think it fit to make the sample signatures available to the expert. Their omission so to do gives rise to an inference that they did not have the confidence that the expert's opinion as to the 2nd defendant's signatures in the notes would be in their favour. Equally unfortunate was the failure of the trial Judge to refer to the 2nd defendant's testimony denying her signature on the notes If there was, as I think there was, some doubt as to the genuineness of the 2nd defendant's signature on the two notes that circumstance itself would cast doubt on the genuineness of the 1st defendant's signatures on the same notes.

With regard to the oral testimony the learned District Judge merely stated that he had no reason to doubt the evidence of the 2nd plaintiff

[1] *1921 L. J. P. C. 174 at page 179 ad finem.* [2] *61 N. L. R. 522 at 524.*

that the two defendants did come to his house and there signed the two promissory notes. No doubt the judge may have been impressed with the manner in which the 2nd plaintiff gave his evidence ; but it does seem to me that his acceptance of that evidence was based largely upon the considerations to which I have just referred and which in my opinion were of little weight for reasons I have attempted to state. On the other hand the evidence as it reads is of so unsatisfactory a nature particularly having regard to the fact that it came from a businessman who spoke to transactions involving considerable sums of money. For instance, while he alleged that he had for a considerable period allowed the 1st defendant to take goods on credit, he did not produce any book of accounts in which was reflected any of the alleged transactions. Indeed he admitted that his books did not contain any indication that the transactions were on credit. His explanation was that although the 1st defendant did not pay for the goods as taken the transactions were entered in the books as being cash transactions. This he said was because the Firm (which consisted of himself and one other partner) could not allow the credit and that credit was allowed by him personally. He made no reference however to the source from which he was able to provide cash in large amounts with which to pay into the Firm the price of the goods supplied to the 1st defendant. If a businessman maintains his books in such a way that what is alleged to have been a credit transaction is reflected in the books as being one for cash, he can scarcely expect a Court to give credence to his allegations.

If the books had been produced, the plaintiffs could at least have pointed to the relevant cash entries in order to establish that there had been in fact large transactions, the total value of which by August, 1953, had amounted to over Rs. 80,000. The failure to produce them even to establish this *prima facie* neutral fact justifies the opinion that even such fact could not have been thus established.

Nor again was the 2nd plaintiff able to give any satisfactory reasons for allowing the 1st defendant to incur unsecured debts in so large a sum as Rs. 87,000. If as he maintained his own business was a profitable one there was no reason why the principal and perhaps sole agency for the distribution of those products was entrusted to a person who according to the plaintiff did not merely keep for himself a margin of profits realised upon disposal of the goods but appropriated for himself a large part of the value of the goods themselves. The explanation for this quite extraordinary state of affairs is entirely unsatisfactory.

For these reasons I would hold that the learned District Judge was wrong in his conclusion that the plaintiffs had satisfactorily proved the signature by the 1st defendant of the two promissory notes referred to in the plaint. That being so the plaintiffs are not entitled to judgment for the amounts of the notes on the basis of a simple money claim. The judgment and decree appealed from are set aside and decree will be entered dismissing the plaintiff's action with costs in both Courts.

Appeal allowed.