APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Aug. 18.

EU HPE YAR AND ONE (APPELLANTS)

v.

TEH LU PE (RESPONDENT).*

Evidence Act, s. 63 (5)—Secondary evidence—Stamp Act, s. 2 (11) duly stamped—New point in appeal—When permissible.

A suit upon two promissory notes said to have been lost by fire after Japanese invasion was first dismissed by the Trial Court but the High Court remanded the case for evidence, and for decision and a decree was passed. Upon appeal it was contended—

(1) that the evidence of the plaintiff and one U Ba Pe was not admissible as secondary evidence,

(2) that the promissory notes were not legally executed as the originals were payable to bearer,

(3) that the promissory notes were not duly stamped since postage stamp of Re. 1 was affixed on each of the promissory notes and therefore secondary evidence was inadmissible and that leave should be granted to raise this point on appeal.

Held : The learned Judges who remanded the case had decided that the evidence of the plaintiff and his witnesses amounted to an admission and that it was not necessary for the promisee and the witnesses to read the whole of the promissory notes themselves.

Ma Mi and one v. *Kallander Ammal*, 5 Ran. 18 ; *Kalenther Ammal* v. *Ma Mi and one*, I L.R. (1924) 2 Ran. 400, distinguished.

Held further : That secondary evidence having been admitted, that admission cannot be called in question under s. 36 of the Stamp Act.

Maung Po Htoo and three others v. *Ma Ma Gyi and one*, I.L.R. (1926) 4 Ran. 363, referred to and followed.

The Court of appeal should not allow a new line attack of which the party affected had no notice during the hearing of the suit.

Nathu Piraji Marwadi v. *Umedmal Gadumal*, I.L.R. (1909) 33 Bom. 35 ; *Sreemutty Dossee* v. *Ranee Lalumonee*, 12 Moores Indian Appeal, s. 470 ; *Gajapati Radhika* v. *Vasudeva Santa Singaro*, (1891-92) L.R. 19 I.A. 179 at p. 183.

No plaintiff should lose his money because of a technical error in the execution of a promissory note and if necessary leave should be granted to amend, basing the claim on the original cause of action.

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* Civil First Appeal No. 24 of 1948 against the decree of the District Court of Tavoy in Civil Regular Suit No. 1 of 1946, dated the 4th March 1948.

Krishna Prasad Sindh and one v. *Ma Aye and others*, (1936-37) I.L.R. 14 Ran. 383 : *Maung Chit and one* v. *Roshan N.M.A. Kareem Coomer & Co.*, (1934) I.L.R. 12 Ran. 500, referred to.

A plaintiff can recover on the original consideration if the claim is set out in the plaint as a cause of action.

Ram Rughubhir Lal and others v. *The United Refineries (Burma), Ltd.*, (1931) I.L.R. 9 Ran. 56 at p. 63 ; *Maung Po Chein* v. *C.R.V.V.V. Chettyar Firm*, A.I.R (1935) Ran. 282, referred to and followed.

The object of the Stamp Act and the Stamp Rules is to get revenue and to prevent evasion of liability therefrom and not to create pitfalls and in this case the basic requirement that the promissory notes must bear adhesive stamps of not less than the proper amount, has been fulfilled.

Radha Bai v. *Nathu Ram*, (1891) I.L.R. 13 All. 66 at p. 73 ; *Bank of Madras* v. *Subbarayalu and one*, (1891) I.L.R. 14 Mad. 32 at p. 35, applied.

The award of interest from the date of the decree is discretionary and the High Court will not as a rule interfere with such orders but in this case the District Judge had not considered the question of subsequent interest at all.

Sourendra Mohan v. *Hari Prasad*, 52 I.A. (418), applied.

K. R. Venkatram for the appellants.

T. Wan Hock for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a decree for recovery with costs of the amounts due on two promissory notes in which the plaintiff-respondent has filed a cross-objection claiming further interest and costs.

The plaintiff-respondent's case is that the defendants-appellants, who are husband and wife, jointly borrowed from him the total sum of Rs. 10,000 in December 1941 and that they jointly executed two on-demand promissory notes for Rs. 5,000 each with interest at one per cent per mensem in his favour. He is unable to produce the promissory notes as he has lost them in the fire which destroyed not only his house but hundreds of other houses in Tavoy at the time of the Japanese invasion thereof, *i.e.* in the month of January 1942. The defendants have not made any payment towards the debt due on the two promissory notes although he has made demands for payment and

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

they have not even replied to his lawyer's notice for payment dated the 28th of November 1946 (Exhibit A).

The appellants' defence is that although they took a loan of Rs. 10,000 executing two promissory notes of Rs. 5,000 each in December 1941, the loan was taken not from the plaintiff-respondent alone but from him and his wife Daw E Mya and the promissory notes were accordingly executed in favour of the plaintiff-respondent and Daw E Mya, that the rates of interest mentioned in the promissory notes were only twelve annas per cent per mensem and not one per cent per mensem, that they have repaid the loan in full by two cheques for Rs. 8,000 each (drawn on the Chinese Overseas Bank) on the 2nd of January 1942, that they have got the promissory notes back from the plaintiff-respondent on such payment and that the promissory notes which have been produced by them and which have since been marked as Exhibits 1 and 2 are the promissory notes on which the said notes were taken.

It is common ground that the promissory notes were written up by the 2nd appellant Ma Kyin Hla in a book of promissory note forms with inner foils in the presence of the 1st appellant, the respondent and two witnesses namely U Ba Pe (P.W. 1) and U Sein Gaung, since deceased, that the appellants executed the promissory notes in the presence of the respondent and the two witnesses and that the two witnesses signed on the inner foils of the promissory notes as witnesses.

The learned District Judge, who heard all the evidence in the case, dismissed the suit holding that neither the respondent nor his witness U Ba Pe could be said to have seen the two promissory notes within the meaning of section 63 (5) of the Evidence Act, and that there accordingly was no evidence which was

admissible as secondary evidence of the contents thereof.

The plaintiff-respondent then appealed to the then High Court of Judicature at Rangoon and a Bench thereof remanded the case to the District Court for the trial of the following issues :

(1) Did the defendants, or either, and which of them, execute the promissory notes sued on, or either, and which of them ?

(2) If so, what has become of that note or those notes ?

(3) What sum or sums, if any, have been repaid by the defendants, or either of them, to the plaintiff on account of the said notes, or either of them, and on what dates ?

(4) To what, if any, relief is the plaintiff entitled ?

In the course of the order of remand, the learned Judges observed :

" The learned District Judge was impressed by the decision of their Lordships of the Privy Council in *Ma Mi and another* v. *Kallander Ammal* (1) that decision is, of course, binding on us and is obviously in acordance with general principles—where it was held that oral evidence of the contents of a document is admissible as secondary evidence only if the witness himself read the document. Of course, it is true that if the witness only heard a third person reading what he (the third party) said was the document aloud that evidence infringes the hearsay rule, but the learned District Judge overlooked the fact that, according to his story, the plaintff in the present case took the documents away with him and presumably saw with his own eyes what their contents were. It would be a strange thing if he had been content having advanced, as he says, Rs. 10,000, to take with him two pieces of paper and never to satisfy himself that they were not, for instance, blank pieces of paper. Apart from that, the learned District Judge has, in my opinion, been misled by the decision on which he relied because in the present case the person who, according to the plaintiff,

(1) 5 Ran. 18.

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

read the documents aloud was actually one of the defendants herself. One of the persons who heard the reading aloud and might have been expected to protest if he did not agree with the document which it was proposed he should execute was the other defendant, and therefore, in my opinion the evidence given by the plaintiff on this subject was admissible on another ground, namely that if true—and, of course, I express no opinion as to its truth or otherwise—but, if true, it showed that there had been an admission, expressly by one defendant and impliedly by the other of the contents of the document which, according to the plaintiff he has lost."

(*See* Civil First Appeal No. 41 of 1947 in the High Court of Judicature at Rangoon.)

After the said order of remand, the parties filed a joint application in the District Court praying that the evidence already recorded might be used for final disposal of the case and they have not adduced any further evidence at all.

The learned District Judge, who, by the way, is not the same District Judge as the one who dismissed the suit, as we have stated above, has decided all the issues in favour of the plaintiff-respondent and granted him a decree.

The decree, however, is only for recovery of the principal sum of Rs. 10,000 with costs ; and costs, inculding the court-fee for the plaint, have been calculated on Rs. 10,000 only. He has disallowed all interests under section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947.

So, the defendants-appellants have appealed from the entire decree, and the plaintiff-respondent has filed a cross-objection claiming that he is entitled to further interest and more costs.

In view of the appellants' defence the question as to whether the promissory notes have been lost by the respondent in the fire, as alleged by him, is bound up with the question as to whether the promissory notes

produced by the appellants, namely Exhibits 1 and 2, are the very promissory notes which were executed when the loans were taken ; and this question is again bound up with the question as to whether the amounts due on the promissory notes have been paid in full as alleged by the appellants. However, to avoid confusion, we must deal with the said questions one by one.

The appellants admit that there was a great fire in Tavoy at the time of the Japanese invasion thereof and that the plaintiff's house as well as theirs were burnt down. However, they contend that the respondent must have removed the promissory notes from Tavoy to other places to which he had admittedly removed other properties. As the learned District Judge has rightly pointed out the respondent, who had no previous experience of a great war, might have thought that it was safer to keep his properties in two or three different places instead of keeping them all together in one place. Besides, Maung Thi (P.W. 2) has given evidence of his having found three iron safes, which had been forced open, and seen papers littered about the house of the respondent shortly after it had been destroyed by fire. U Ba Pe (P.W. 1) has also corroborated the evidence of the respondent, stating that the latter informed him of the loss in the fire of the two promissory notes and other valuable documents as well as some cash and gold about ten days after the Japanese invasion, *i.e.* about ten days after the fire.

The appellants have also contented that the respondent did not lose the promissory notes in the fire as he has returned them to the first appellant on the 2nd January 1942, *i.e.* before the fire, when the latter gave him two cheques for Rs. 8,000 each. However, there is only the evidence of the first appellant to show that the amounts due on the two promissory notes had been paid by

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

cheques. Before the hearing of the suit the respondent made an application for particulars with reference to the cheques, but the appellants refused to give them. The second appellant does not know anything about the cheques, and the first appellant has stated that one cheque was from Kean Eng Company and that the other cheque was from Q. Han Choon of Tavoy. According to him, the first cheque was brought to him by his nephew Shin Ngar and the second cheque was brought to him by Ah Choon ; but neither Shin Ngar nor Ah Choon nor any representative of Lami Co., which is alleged to have instructed Q. Han Choon to give him the second cheque, has given evidence in the case. Ong Kar Hyouk (P.W. 1) has given evidence about his having paid Rs. 13,000 to the first appellant in the name of Kean Eng Co. just before the Japanese invasion of Tavoy. However, he made the following contradictory statements :

> "I made a cheque for a sum of Rs. 13,000 payable to Khay Seng Company, Tavoy (*i.e.* the first appellant). I cannot say as I do not remember now whether I gave two cheques or one cheque for that amount. * * *
> The amount written in the cheque was written of my own accord. Eu Hpe Yar (the first appellant) did not tell me for what amount the cheque is to be written ; neither did he tell me in how many cheques the amount of Rs. 13,000 was to be made payable."

Besides, he cannot say whether the cheque for the amount of Rs. 13,000 has been cashed or not. It would appear from the evidence of this witness that the first appellant got from Kean Eng Co. a cheque not for Rs. 8,000 only as alleged by him, but for Rs. 13,000. The first appellant has not alleged in his evidence that although the total amount due to him was Rs. 13,000 he asked the witness to give him that amount in two cheques, one of which was for Rs. 8,000 only.

Apart from the fact that there is no satisfactory evidence of the first appellant having got two cheques for Rs. 8,000 each as alleged by him, the allegation that he made over the cheques for Rs. 16,000 in all, when the amount due on the promissory note was Rs. 10,075 only, does not at all sound convincing. He did not even get a receipt for the sum of Rs. 5,925 which was to be returned to him as surplus by the respondent. Besides, both the appellants have admitted that about 8 days before the loan of Rs. 10,000 was taken by them on the promissory notes the second appellant had pledged some gold ornaments with the respondent's wife Daw Aye Mya for Rs. 3,000 with interest at ten annas per cent per mensem. The sum of Rs. 5,925 which the first appellant is alleged to have paid in excess of the amount due on the promissory notes was more than sufficient for redemption of the pledged articles, and yet the first appellant did not ask for return of the pledged articles at the time of the alleged payment.

Within a few months after the reoccupation of Tavoy by the British, C. Su Tha (P.W. 5) went and asked the appellants to redeem the pledged articles and pay the money due on the promissory notes at the instance of the respondent for Daw Aye Mya. They did not tell him then that they had repaid the loans on the two promissory notes, that there, in fact, was an overpayment by two cheques, that the sum of Rs. 5,925 was still due to them on account of such overpayment, and that the debt due on the pledge of the said articles could be set off against that amount. On the other hand, they admittedly went carrying cash with them to redeem the said articles about a month after the witness had spoken to them on behalf of Daw Aye Mya. The appellants went to redeem the said articles on four different

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

occasions after the witness had spoken to them; and the first appellant has stated:

"On all the four occasions that I went to Teh Lu Pe's house for redemption of the pledged gold as well as to have a talk about the loan of Ps. 10,000 taken from him, I did not on any of those occasion tell Teh Lu Pe that I had the two discharged promissory notes with me, and that I had already repaid the loan. I did not tell him about that, because I thought the only way by which I could get back the balance sum of Rs. 5,925 from Teh Lu Pe is if he files a suit against me for the loan of Rs. 10,000. * * When we went to the plaintiff's house to redeem the pledged gold we took cash with us for redemption of our pledged gold."

The second appellant has also stated:

"When we went to Teh Lu Pe and Daw Aye Mya to redeem our pledged gold from them, we took money with us for redemption of our gold. * * * * I did not tell Teh Lu Pe or his wife Daw Aye Mya to set off the principal of Rs. 3,000 and interest due on our pledged gold from the amount of Rs. 5,925 which we were to get back from Teh Lu Pe, because I had in mind that we would get back that amount of Rs. 5,925 if Teh Lu Pe files a suit against us for the loan of Rs. 10,000."

The reason they have assigned for their silence about their having repaid the amounts due on the two promissory notes and about there being a sum of Rs. 5,925 to be refunded to them is not at all convincing; and although the respondent has filed a suit on the two promissory notes, they have neither filed a cross suit nor made a cross claim for recovery of the said sum of Rs. 5,925 at all. They have also admitted that they have not shown the promissory notes, Exhibits 1 and 2, to any one except their lawyer before they where actually produced in Court in the course of the first appellant's evidence in chief on the 1st April 1947. They did not reply to the notice of demand by the learned advocate for the respondent (Exhibit A), and they actually refused to let him inspect Exhibits 1 and 2 and opposed

the respondent's application for permission to inspect them.

Under these circumstances, we are of opinion that the learned District Judge is right in holding that the amounts due on the promissory notes have not been repaid as alleged or at all and that the promissory notes executed by the appellants have not been returned by the respondent to the first appellants.

The respondent's case that the loans were taken from him alone and that the promissory notes were executed only in his favour—and not in favour of his wife Daw Aye Mya and himself—is supported not only by Daw Aye Mya but also by U Ba Pe, and the first appellant has stated " I gave Rs. 3 each to U Sein Gaung and Maung Ba Pe for being present as witnesses." The respondent and Daw Aye Mya have also explained that the former used to lend out money on mortgages and promissory notes and that the latter used to lend money on pledges of moveables such as jewellery ; and their explanation is supported to a certain extent by the fact that the second appellant herself pledged her gold with Daw Aye Mya alone.

For the above reasons we are of the opinion that the learned District Judge is right in holding that Exhibits 1 and 2 in favour of the respondent and Daw Aye Mya are not the promissory notes, which were executed by the appellants at the time of the loan, and that the promissory notes, which were executed then, have really been lost.

It has been contended by the learned Advocate for the appellants on the authority of *Ma Mi and another* v. *Kallender Ammal* (1) confirming the decree of the High Court of Judicature at Rangoon in *Kalenther Ammal* v. *Ma Mi and one* (2) that even if the promissory notes have been lost the learned district Judge

(1) 5 Ran. 18. (2) (1924) I.L.R. 2 Ran. 400.

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

erred in admitting the evidence of the respondent and U Ba Pe as secondary evidence of the contents thereof under section 63 (5) of the Evidence Act inasmuch as they had not seen (*i.e.* had not read) them. However, the learned Judges who remanded the case for trial have given reasons for distinguishing those rulings and for holding that the evidence is admissible as good secondary evidence of the contents of the promissory notes in the case of their loss having been proved; and we are in entire agreement with them. This is a case in which promissory notes were filled up in a book of printed forms with inner foils by one of the joint promisors at the time of the loans in the presence of the promisee, the other joint promisor and two witnesses who were present on special invitation to witness the loan and the execution of the promissory notes and who actually had to sign the inner foil as witnesses. It was not necessary for the promisee and the witnesses to read the whole of the promissory notes which admittedly were in the usual printed form. It was quite sufficient for them to see how the blanks as to the date, the amount, the names of the promisors and the rate of interest were filled up ; a glance or two at each promissory note would have been enough to check the said entries (*see* Exhibits 1 and 2); and we cannot believe that the respondent, who was lending out as much as Rs. 10,000 did not take the trouble to check the entries or that the witnesses, who signed in the inner-foils, did not actually see the entries. ***Kalenther Ammal*** v. ***Ma Mi and one*** (1) was a case in which the writer of the document was not called as a witness and the witnesses' accounts of the contents of the document were " obviously derived from another source than seeing it." [*See* pages 402 and 405 of (1924) I.L.R. 2 Ran.] Besides, as has been observed in the said order of remand

(1) (1924) I.L.R. 2 Ran. 400.

the evidence of the respondent and U Ba Pe is admissible to show that there was an admission, expressly by one defendant and impliedly by the other, of the contents of the promisscry notes. (*See* section 22 of the Evidence Act.) In this connection we are of the opinion that the learned District Judge is right in holding on the evidence of the respondent and U Ba Pe—and on probabilities—that the second appellant did read out the promissory notes in the presence and hearing of the respondent, the first appellant and the witnesses before they were signed. For the above reasons we are of the opinion that the learned District Judge is right in admitting the evidence of the respondent and U Ba Pe as good secondry evidence of the contents of the promissory notes.

The learned Advocate for the appellants has also contended that the promissory notes were not valid as they were payable to bearer. It is not the appellants' case that they were payable to bearer. On raising this objection the learned Advocate is taking advantage of the respondent having stated under lengthy cross-examination "The usual term in the promissory note for the borrower of money is for the borrower to promise to pay the lender or the bearer of that promissory note. As far as I remember both those two promissory notes contained that clause." However, it is common ground that the promissory notes were written in a book of printed forms and such forms usually are of promissory notes payable to order like Exhibits 1 and 2; and the actual Burmese words used by the respondent in the said statement have not been recorded; and we are not satisfied that the Paper Currency Act has in fact been infringed or that the said statement amounts to an admission of its infringement.

Ultimately the learned Advocate for the appellants wishes to argue (1) that the promissory notes were not

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

"duly stamped" according to the definition in section 2 (*11*) of the Stamp Act since the respondent has stated "A postage stamp of Re. 1 was affixed on each of the promissory notes" and Rule 16 of the Burma Stamp Rules, 1940, provides that "the adhesive stamps used to denote duty shall be the requisite number of stamps of the value of four annas or two annas or one anna or half anna". (2) that the promissory notes themselves must be held to be inadmissable in evidence under Proviso (*a*) to section 35 of the Stamp Act, and (3) that secondary evidence of the contents of the promissory notes is therefore inadmissible.

However these questions were not raised in the District Court. The respondent made the said statement on the 29th November 1946, and if the questions had been raised before the 31st March 1947, the respondent could have amended the plaint, if amendment was necessary at all, so as to base the cause of action on the original consideration for the promissory notes. Even if the questions had been raised in the District Court after the 31st March 1947, and after the said order of remand, which was passed on the basis of the promissory notes having been duly stamped, the respondent could have been allowed to amend the plaint, if necessary, for the said purpose in accordance with the ruling in *Krishna Prasad Singh and another* v. *Ma Ave and others* (1), wherein Dunkley J. observed:

> "It would be monstrous, to my mind, that the plaintiff should lose his money merely because of a technical error in the execution of the promissory note, which is no more than a conditional payment and not a discharge of the debt. [*Maung Chit and another* v. *Roshan N.M.A. Kareem Oomer & Co.* (2)]."

Moreover, the said questions have not been raised in the memorandum of Appeal. There is a reference in

(1) (1936-37) I.L.R. 14 Ran. 383. (2) (1934) I.L.R. 12 Ran 500.

ground of Appeal No. 3 (v) (*b*) to the allegation by the respondent that on the promissory notes for Rs. 5,000 each, postage stamp of Re. 1 each was affixed, but the context show that the object of the reference thereto is not to show that the promissory notes were not duly stamped but to show that the allegation is improbable as the respondent is an experienced money-lender and that the promissory notes were really stamped as alleged by the appellants with a four annas stamp each in accordance with the Stamp Act and the Stamp Rules.

Under these circumstances the learned Advocate for the respondent has submitted (1) that secondary evidence having in fact been admitted, that admission cannot be called in question now on the ground that the promissory notes were not duly stamped, (2) that leave under Order 41, Rule 2, of the Code of Civil Procedure might not be granted to the appellant to urge the said grounds of objection, (3) that in the case of such leave being granted, he might be allowed to amend the plaint and claim a decree on the original consideration even at this stage, if we are of the opinion that such amendment is necessary and (4) that amendment of the plaint is really unnecessary as it discloses a cause of action on the original consideration on which the respondent can succeed independently of the promissory notes.

With reference to his first submission it has been held in *Maung Po Htoo and three* v. *Ma Ma Gyi and one* (1) that section 35 of the Stamp Act, read with the provisions of the Evidence Act, renders inadmissible in evidence both the original instrument, if not duly stamped, as well as secondary evidence of its contents. But under section 36, when either the original instrument itself or secondary evidence of its contents has in fact been admitted, that admission may not be

(1) (1926) I.L.R. 4 Ran. 363.

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

called in question in the same suit, on the ground that the instrument was not duly stamped. The learned Advocate for the appellants relies on the ruling in the *Rajah of Bobbili* v. *Inuganti China Sitarasami Garu* (1); but that is a case in which the question under section 36 does not arise as secondary evidence has never been admitted.

With reference to his second submission, a Bench of the Bombay High Court has held in *Nathu Piraji Marwadi* v. *Umedmal Gadumal* (2):

> "A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.
>
> A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit."

Their Lordships of the Privy Council also have observed in *Sreemutty Dosse* v. *Ranee Lalunmonee* (3), cited with approval in *Gajapati Radhika* v. *Vasudeva Santa Singaro* (4):

> "Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious that if they wished to make the case which they now make they would, by their answer, have put the case in the alternative."

His third submission is in accordance with the ruling in *Krishna Prasad Singh and another* v. *Ma Aye and others* (5) and Dunkley J.'s observations therein which have already been quoted.

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(1) (1899) L.R. 26 I.A. 262.
(2) (1909) I.L.R. 33 Bom. 35.
(3) 12 Moore's Indian Appeals, 470.
(4) (1891-92) L.R. 19 I.A. 179 at p. 183.
(5) (1936-37) I.L.R. 14 Ran. 383.

His fourth submission is supported by the ruling in *Ram Ragubhir Lal and others* v. *The United Refineries (Burma) Limited* (1), which has been followed in *Maung Po Chein* v. *C.R.V.V.V. Chettyar Firm* (2). According to the said ruling "where a promissory note is inadmissible in evidence, as being not duly stamped, the plaintiff can still recover on the original consideration, if set out in the plaint as a cause of action." In the course of his judgment therein, Carr J. observed :

"I have no doubt that the plaint was originally drawn as one in a suit on a pro-note, but its sufficiency as a plaint on the original consideration seems to me to depend on whether it discloses a cause of action on which the plaintiff can succeed independently of the pro-note. And in my opinion it satisfies this test, though it would have simplified matters had it been amended. If we omit from the plaint all references, direct or indirect, to the promissory note, we still have a clear statement that there is still owing to the plaintiff the sum of two lacs of rupees on account of the sale price of the refinery, and that is I think a sufficient disclosure of a cause of action for the relief claimed."

In the present case the very first paragraph of the plaint discloses a cause of action on the original consideration. It reads :

"That, at Tavoy, in the month of December 1941, the defendants abovenamed jointly borrowed on the same day a total sum of Rs. 10,000 in two sums of Rs. 5,000 each from the plaintiff and in consideration thereof, they have jointly executed on the very day two on-demand notes of Rs. 5,000 each, with interest payable on each of them at the rate of Re. 1 per cent per mensem in favour of the plaintiff."

Besides the appellants have stated in paragraph 2 of their written statement that they executed the promissory notes "as collateral security for two loans."

(1) (1921) I.L.R. 9 Ran. 56 at p. 63. (2) A.I.R. 1935 Ran. 282.

H.C. 1948

EU MPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

So we hold that it is not open to the appellants to raise the said objections at this stage and that if it were still open to them to do so, a decree on the original consideration would, in the interests of Justice, have to be granted to the respondent.

At the same time we are also of the opinion that the pro-notes were not invalid merely because they were stamped with one rupee postage stamps instead of four-anna postage stamps and that the learned District Judge was right in passing a decree upon them, *i.e.* in acting upon them within the meaning of section 35 of the Stamp Act. The greater includes the less and the basic requirement that they must bear adhesive stamps of not less than the proper amount has been fulfilled. The object of the Stamp Act and the Stamp Rules is to get revenue and to prevent evasion of liability, therefore and not to create pitfalls. Straight J. has observed in *Radha Bai* v. *Nathu Ram* (1):

"Now it is, I believe, a golden rule of all Judges who have to administer the laws relating to stamps and cognate matters that the provisions of such laws are to be construed strictly, and whenever there is any ambiguity or doubt, in favour of the subject. Consequently, following such rule and believing it to be a sound and just rule, I shall not hold that this document is an unstamped document unless I find anything in the Governor-General's rules which places it beyond all doubt that this is so."

Mahmood J. also cited therein the following passage from a judgment of Sir Michael Westropp:

"The imposition of such excessive and minute details would be pitfalls to the unwary and would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous results, in the form of revenue to the State, as would compensate it for the discontent which would be occasioned. The Legislature has avoided such

(1) (1891) I.L.R. 13 All. 66 at p. 73.

stringent details, and it seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of pending the document as would admit of that stamp being used for or applied to any other instrument."

The respondent has explained that the promissory notes were stamped with Re. 1 stamps to be on the safe side. He probably did not know the exact amount of stamp duty for a promissory not for Rs. 5,000 as the rates of stamp duty for promissory notes had been varied from time to time, and it will be absolutely unjust to punish him by the invalidation of the promissory notes for having paid more revenue than was really necessary. In the words of Edge C.J. in *Radha Bai* v. *Nathu Ram* (1) " such a prohibition as is contended for in this case must be specifically enacted, if any such prohibition is intended." (Cf. *Bank of Madras* v. *Subbarayalu and another* (2), wherein Best J. observed :

"To justify the exclusion from evidence of a document like A (which is admittedly executed on an impressed sheet of the proper value) on the ground that the stamp bears the word hundi, there must be a distinct and positive rule against the employment of such paper for the purpose and not merely a dubious inference as to the intention of the framers of the rules."

And there is no express prohibition in Rule 16 of the Stamp Rules of adhesive stamps of higher denominations being used. The Rule probably did not mention stamps of higher denomination than four annas, as four annas was the maximum stamp duty for promissory notes, when it was made.

The appeal fails and must be dismissed with costs.

As regards the cross-objection, the plaintiff-respondent, who has waived interest from December

(1) (1891) I.L.R. 13 All. 66 at p. 73 (2) (1891) I.L.R. 14 Mad. 32 at p. 35.

H.C. 1948

EU HPE YAR AND ONE v. TEH LU PE.

U THEIN MAUNG, C.J.

1941 to the 31st January 1942 even before the Accrual of Interest (War-Time Adjustment) Act, 1947, was enacted and who has been deprived of all interest from the 8th December 1941 to the 31st March 1947, should in fairness have been awarded interest at the contract rate from the 1st April 1947 up to the 8th March 1948, which is the date of the decree under section 34 of the Code of Civil Procedure.

He should also have been awarded interest at the Court rate of 6 per cent per annum on the aggregate of the decretal amount from the date of the decree up to the date of realization under the same section of the Code. It is true that the award of interest under the said section is discretionary and that this Court will not, as a rule, interfere with a lower Court's order refusing to order such interest to be paid [Cf. *Sourendra Mohan* v. *Hari Prasad* (1)]. However, in this case the learned District Judge does not appear to have considered the question of awarding interest under the section at all.

The respondent is entitled to the costs of Civil First Appeal No. 41 of 1947 in the High Court of Judicature at Rangoon, *i.e.* the appeal in which the order of remand was passed. The order therein expressly stated " the costs of the abottive hearing (in the District Court) and proceedings before us should abide the event of the new trial ;' and the learned District Judge has obviously overlooked it.

The respondent is also entitled to the full amount of the Court Fees that he has paid on his plaint before the Accrual of Interest (War-Time Adjustment) Act, 1947 came into force. He had to pay Court Fees on interest also in accordance with the law as it stood then, and it is but fair that the defendants-appellants, who get

(1) 52 I.A. 418.

the benefit of the Act having been enacted subsequently, should be made to bear the full Court Fee as part of the costs.

So we allow the cross-objection *in toto*, order that the decree of the District Court be amended accordingly and dismiss the appeal with costs.

U SAN MAUNG, J.—I agree.