Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Chartered Mercantile Bank of India, London, and China, v. Dickson and Tatham, from the Supreme Court of the Island of Ceylon; delivered 28th January, 1871.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
SIR JOSEPH NAPIER.

IN this case, in which the action was based upon a claim by the Appellants, The Chartered Mercantile Bank of India, as holders of a promissory note for £5000, against Dickson and Tatham as payees and endorsers of the note, various defences were pleaded by the present Respondent, Thomas Dickson. It is necessary to mention those defences in order to see what question, and what question only is open upon this Appeal. The first defence by way of plea was that Dickson ceased to be a partner of the firm of Dickson, Tatham, and Company, "before "the presentation and dishonour of the said note, "of which the Plaintiff had due notice, and that "no notice of dishonour of the note was given to "the Defendant." Notice, however, of dishonour was given to Tatham, the partner in the Colony, charged with the liquidation of the affairs of the partnership, and as this issue has been found against the Respondent, it need not be further referred to. The next plea raised this defence: it says, "The note was endorsed by the firm of Dickson, "Tatham, and Company as sureties for and for the "accommodation of the makers thereof, of which "the Plaintiff had full notice; that the Defendant "is discharged from his liability under the said "note, by reason of the time given by the Plaintiff

" to the makers of the said note, and by subse-
" quent arrangements made by the Plaintiff with
" the makers who furnished other securities for the
" said note." That issue also has been found
against the Respondent, and is not now open. We
pass over the third plea for the present, and proceed
to the fourth. The fourth plea was, " The said
" note has been either paid in account with the
" makers or the other endorser thereof, or by the
" cross drafts with securities attached, given by the
" makers or by the said endorser." That issue
also has been found against the Respondents. The
fifth is, that " after his retirement from the firm,
" the Plaintiff adopted the new firm of Dickson,
" Tatham, and Company, then consisting of the
" remaining partner, Christopher Tatham alone, as
" their debtors, and discharged this Defendant."
For that plea there was no foundation, and it has
been found against the Respondents. The sixth is,
" Tatham made the said note as an accommodation
" note for the convenience and accommodation of
" the Plaintiff and the maker thereof, and in breach
" of the deed of partnership between the first and
" second Defendants, and that the Plaintiff was
" fully aware of the existence of the said deed of
" partnership, and of the covenant therein, be-
" tween the parties prohibiting the making or en-
" dorsing any accommodation or other bills, which
" were not for the benefit of the partnership."
That issue also has been found against the Respon-
dent.

The result, therefore, is that with regard to the
inception of the note and its validity at the time of
the making of it, all the defences which denied its
validity or qualified its effect, according to what
the law would impute to it upon the face of it,—all
those issues were found against the Respondents,
and it must now be taken that the note at its
original making was a valid note, binding all the
parties according to the contract which the law
would imply, and uncontrolled by any collateral
agreement.

The third plea, which we passed over, states
" That there was undue delay in presenting the said
" note, and the Defendant is thereby released from
" his obligation thereunder." Now, that plea raises
a question which has been called a mixed question

of law and fact. This issue has been found in favour of the Respondents by the Primary Court in Ceylon, and, upon Appeal, by the Appellate Court. It is to be observed that upon the occasion of that appeal, the only question before the Appellate Court again, was the question of the validity of this defence contained in the third plea. There was no cross-appeal on the part of the Respondent, attempting to re-open the other issues which had been found against him by the Primary Court.

The plea, therefore, raises the question (one of very great importance), what is the law with regard to the time for the presentation of a promissory note, payable upon demand, and endorsed over? It is contended that the law upon this subject requires a presentation to the maker of the note within reasonable time, and that the proper issue to be considered when a question of this kind is raised—the proper direction to be given to a jury, the proper proposition to which a Court, judging of the fact, is to address *itself*—is this, was or was *not* the note presented within a reasonable time?

The authorities upon this point in English law are certainly meagre. The cases of bills of exchange and of cheques stand upon a footing obviously different, and the law as to them does not by any means of necessity decide the present question. We have been referred to some American authorities in support of the proposition that the question to be determined is always whether the presentation for payment was made within a reasonable time. Their Lordships think it better to assume, as was contended by the Respondents, that this is a proper definition of the question to be considered. They would be unwilling to preclude any argument upon that in any other case when there might be an opportunity of considering it more fully. It is sufficient to assume it in the present case, and to deal with this case upon the assumption made by the Respondent, that if it turned out that presentation of this note was not made within a period, which they term a reasonable period,—that is, a period reasonable with reference to the circumstances connected with this particular note,—he, the endorser, is discharged.

Now, before adverting to the opinion of the Courts below upon this point, their Lordships will state what, in their opinion, is the result of the evi-

dence in this case. It appears that the note in question was dated on the 17th of February, 1864. The findings of the Courts below compel us to assume that at the time of the making of the note it was a valid note, as to which, at the time of its making, it was not open to the Respondent to impeach, control, or limit his liability. Upon the face of it the note runs in this form:—"On "demand we promise to pay to Messrs. Dickson, "Tatham, and Company, or order here, the sum of "five thousand pounds value received, Sinne Lebbe "Bros." Endorsed "Dickson, Tatham, and Com-"pany." Then "Pay the Chartered Mercantile "Bank of India, London, and China, or order. E. "Nanny Tamby."

Now, treating this as a valid note in its inception, and taking the note on the face of it, the note would import, according to the ordinary rule of law, that the makers were the principal debtors, that the payees of the note who endorse it were merely sureties, and that that was the relative position of those two parties upon this instrument.

Their Lordships consider that the result of the evidence both of Mr. Le Marchand, the Manager of the Bank, and of Mr. Tatham, the partner in Dickson, Tatham, and Company,—judging of that evidence by the findings of the Court, to which reference has already been made,—shows that the position of the parties, with regard to this note, was really that position which the law itself would imply from the appearance of the note itself; namely, that Sinne Lebbe Brothers were the principal debtors; that Dickson, Tatham, and Company were sureties; and they are of opinion that it is perfectly made out that the Bank were aware of that fact. Their Lordships think it also clear that, although the note is payable on demand, no payment of the note by the makers at any immediate or specific date was contemplated, and therefore the note was meant to be, to a greater or less extent, a continuing security.

It appears, then, that this being the case, Mr. Tatham, the partner in the Colony, left the Colony. The date is not precisely given, but it was about the end of February, or the beginning of March. It appears that before he left the Colony he had had a conversation with the Manager of the Bank.

He and the Manager of the Bank are in dispute as to what the nature and effect of that conversation was; but there is no suggestion on the part of Mr. Tatham that, whatever he may have said about the note at that conversation, he at that time indicated any wish on his part that the note, if valid, should be pressed against Sinne Lebbe Brothers; that any early period should be taken for making a demand, or that any communication should be made to them as endorsers of what was done by the Bank, as to pressing payment of the note from Sinne Lebbe Brothers. He left England, and was absent from the Colony for some months. He returned in the month of August, in the same year, to the Colony. At that time he states that he found the account of Sinne Lebbe Brothers with his own house was in, what he terms, an unsatisfactory position. A sum of upwards of £6000 was due upon it, and there were some other claims that they might have against Sinne Lebbe Brothers. During his absence in England, *in consequence of* some disputes with his partner, the partnership of Dickson, Tatham, and Company had been dissolved. The dissolution was to take effect from the 13th June, 1864, and upon the evidence, it must be taken that that dissolution was known in the Colony soon afterwards, probably the end of July or in the month of August.

Their Lordships, however, are of opinion that with the disputes between Mr. Tatham and his partner they have nothing in this proceeding to do. Mr. Dickson, if he was entirely dissatisfied with the conduct of Mr. Tatham, might have come out himself to Ceylon and taken the management of affairs there; or, if the conduct of Mr. Tatham was such as was altogether irregular in a partner, Mr. Dickson might have applied to a Court to curtail his rights to deal with the assets, and to have a receiver appointed. He took neither of these courses, and Mr. Tatham returned to the Colony, notwithstanding the dissolution, as the person invested both by law, and indeed by agreement under the Articles of Dissolution, with the right to liquidate and wind up the estate, and to do all that was incidental to that liquidation. The acts, therefore, of Mr. Tatham after the return to the Colony, must be looked upon as the acts of the partnership in liquidation,

and must not be embarrassed by any considerations of dissatisfaction that Mr. Dickson may have felt with the course taken by Mr. Tatham.

Having returned to the Colony, Mr. Tatham, on the 22nd September, 1864, wrote a letter to the firm of Sinne Lebbe and Company. It is on page 56. Writing in the name of the firm of Dickson, Tatham, and Company, he says: "Dear Sirs— "We beg to hand you our account in re the ad-"vance on plantation coffee, showing a balance of "£6433. 19*s*. 6*d*. in our favour, per 14th Septem-"ber. We are unable to hand you accounts for "other claims, but to enable you to estimate our "relative position, we think they will be: first"— an item which I need not refer to; "second and "third," items also which have nothing to say to the present case, but which are considerable in amount; "fourth, guaranteed bill to the C. M. "Bank" (that is the Chartered Mercantile Bank) "£5000; fifth, balance due on first contract, native "coffee with interest to 30th June, 1864." All those items are added up, and they make together a total of £20,788. And the note continues—"ir-"respective of our claim for allowance on coffee not "delivered, as p. bond (on the bond itself) and "indent of piece goods amounting to upwards of "£8000, you will, of course, understand we name "these sums without prejudice to any larger claims "we may hereafter find to be owing by you."

Now, the first observation which arises upon this note is this: that it, of course, made almost inevitable the conclusion at which the Court in the Colony has arrived upon the other issues in this case. It would be utterly impossible that the partnership, on behalf of whom this note was written, could be held to aver that, in their opinion, at any period at or after the time of making the promissory note up to this 22nd September, they entertained the opinion that the note was not a note originally binding upon them, or a note controlled or superseded by any collateral agreement. But it also, in their Lordships' opinion, puts an end to the question of any delay up to the 22nd of September in the presentation of the note for payment. It is impossible to suppose that the Partnership, on behalf of whom this note was written, who treat this bill "guaranteed" to the Chartered Mercantile Bank as

the foundation of a claim which they would have against the firm of Sinne Lebbe and Company, contending that at that time they were of opinion that by reason of delay in presenting that note all remedy against them upon it had come to an end. If the note had been presented and dishonoured, notice would have been given to them. They must, therefore, have been aware that the note had not been presented for payment; the payment had not been demanded; that it was with the Chartered Mercantile Bank, and they treated it as a note upon which a claim might be made against them. It was suggested that the letter might have been written with reference to the contingency of the note passing into the hands of third parties, and thus being made in third hands the foundation of a claim. It is scarcely possible to accept that view of the letter. If the house of Dickson, Tatham, and Company believed that there was no claim against them on the part of the Bank, but that there might be a claim against them if it got into circulation and was in the hands of third parties, the obvious course which would have been taken by Mr. Tatham would have been to go to the Bank and say, "Have you that note still in your possession? You "must take care, or I must see that you take care, "that it does not get into circulation. You have no "claim against us upon it; we must take care that "it does not get into third hands, where there "might be a claim against us on the note." On the 22nd September, therefore, it must have been the opinion of Dickson, Tatham, and Company that there had been no delay in presenting this note for payment.

We find, next, two facts of importance in the evidence of the case. At the end of page 50, Mr. Tatham states this: He says, "He first told me— "that is, Le Marchand first told me—that he in- "tended to hold me liable for the note, in October "or November, 1864." It is possible that may be so, but it is equally consistent with the case of the Bank that no doubt was entertained on their part of the liability of Dickson, Tatham, and Company; and it is certainly consistent with the letter of Mr. Tatham, of the 22nd September, which assumes the liability. However, the evidence continues: "Le "Marchand and I at that time were holding meet-

" ings almost daily about Sinne Lebbe's affairs. " They were insolvent at the time." And at page 12, the same witness, Mr. Tatham, says, speaking of his return, "I often saw Le Marchand about " Sinne Lebbe's account (not the note in particular) " after my return to Ceylon in August. We were to " receive a cheque in full in case of the bank arrang- " ing Sinne Lebbe's affairs in another quarter,"a— cheque in full, I suppose, for the whole of their demand—" Many arrangements were suggested. M. " Le Marchand was always leading me on that he " would settle, and I was very busy." We find, therefore, that the state of things was that after this letter of the 22nd September was written, and indeed before it, and from that time until the failure of Sinne Lebbe, Mr. Le Marchand and Mr. Tatham were in daily intercourse upon the affairs of Sinne Lebbe, clearly for the purpose of treating the position of Sinne Lebbe in the most judicious manner, both the bank, and Dickson, Tatham, and Company being interested in the same way in keeping Sinne Lebbe and Company, as a house, on foot, and in preventing any pressure which might lead to their insolvency.

In that state of things we have, on the one hand, no suggestion whatever by Mr. Tatham that he—knowing that this note was in existence, having treated it as that which might found a claim against Sinne Lebbe Brothers—urged upon the Bank to present the note and to ask for payment, and to put the note, if necessary, in suit; and, on the other hand, we have it clearly and obviously the interest, not merely of the Mercantile Bank, but of Dickson, Tatham, and Company, themselves in liquidation, that no sudden and abrupt proceeding of that kind should take place against Sinne Lebbe Brothers, which could only have had the result of precipitating their Bankruptcy.

If then, on the 22nd September, it was the opinion of Dickson, Tatham, and Company, and if it was the fact that there had been no undue delay in presenting this note, certainly the lapse of time afterwards, under the circumstances to which I have referred, cannot, in their Lordships' opinion, constitute an unreasonable delay.

Their Lordships, therefore, if this matter were *res integra* before them, and if they were addressing themselves to the inquiry, which I have assumed

to be the proper one—whether the note was presented in reasonable time—would be prepared to hold that, having regard to all the circumstances of this case, there was no unreasonable delay in presenting the note. And they have now to consider the view that has been taken by the Court below, in order to determine the advice which they should tender to Her Majesty with regard to this Appeal.

Now, their Lordships have always been anxious to maintain the view that upon questions of fact, where there is a conflict of evidence in the Court below, where the weight to be given to the evidence depends considerably upon the manner, upon the demeanour, and the appearance of the witnesses, —where of local matters the local Judges are more generally the best able to form a true and correct opinion; that in cases of that kind it is inexpedient that this Tribunal should differ from the conclusions of fact arrived at in the Court below, unless they are clearly of opinion that the Court below was in error. In this case, however, there is considerable peculiarity. The inquiry, which we have assumed to be the proper one, is a mixed question of law and of fact. There is here no controversy in the materials with which we have now to deal upon the question of fact. The Court below have found all the questions of fact by their findings upon the other issues to which reference has been made; and the real question is, whether those findings of fact have been properly applied in dealing with the issue now under consideration?

Now, what their Lordships find to have been the course taken by the Primary Court was this. The learned Judge, after disposing of all the other issues, proceeds thus at page 57, "It remains, therefore, " only to consider the third plea, that there was " undue delay in the presentation of the note by " Plaintiffs, whereby the Defendants were re- " leased." Then he cites a passage on the subject from Byles on Bills, and he continues, "The " Court, therefore, has to consider whether there " were circumstances in the present case which " made it the duty of the Plaintiffs to present the " note at an earlier date than that actually chosen " by them. The Plaintiffs, it must be noticed, " were bankers, and the makers and endorsers were " all their customers. In January, 1864, before the

"note was given, the first Defendant complained to "the Manager of the Bank in London of the con- "duct of the Manager in Colombo, who had taken "drafts of the second Defendant, then managing "the business of the firm in Colombo, for large "amounts without their being properly covered." Now, their Lordships pause there for the purpose of saying that this which appears to enter into the Judgment as a reason, is a circumstance which, clearly, is altogether irrelevant. A communication made to the Bank in London, in January, 1864, which, in fact, was an expression of disapproval, on the part of Mr. Dickson, of the conduct of the Manager of the Bank in Colombo, would, in the first place, be a communication unlikely to reach the Manager of the Bank in Colombo. But whether it would or would not, it has nothing whatever to say to the circumstances of the present case, —it was no complaint with reference to the present note, or the transaction out of which that note originated. The learned Judge continues: "The "partnership between the first and second Defen- "dants was dissolved on the 30th June, 1864, and "the Manager of the Bank in London was aware of "the dissolution. The Manager of the Colombo "branch must, therefore, have been aware of it early "in August, probably about the 4th or 5th. The "business of the firm, after the dissolution, continued "to be carried on by the second Defendant, and the "Plaintiffs were employed by first Defendant to re- "ceive from the second the proceeds of his share in "the partnership assets, as the same were, from time "to time realized, and to remit them to him, and from "August to December the Bank was in constant "correspondence with the first Defendant as to these "recoveries and remittances. During the whole of "this period, the position of Sinne Lebbe Brothers, "the makers of the note, was known to the Managers "of the Bank, both in London and Colombo, to be "most critical. The Manager in Colombo was also "aware that the negotiation between the Defendants "and Messrs. Sinne Lebbe Brothers respecting the "advance by the former to the latter of a sum of "£50,000, of which this £5000, raised by means of "the note, formed part, had been broken off. The "dangerous position in which the maker of the note "stood throughout the year 1864, the failure of the

"consideration which had induced second Defendant "to endorse the note, and the anxiety of the first "Defendant to close all his accounts with his late "firm, were all reasons which should have induced the "Plaintiffs to lose no time in presenting the note." Now, if the learned Judge means to say that the knowledge that the contemplated loan of £50,000, out of which this £5000 was to be repaid, had gone off, should have made the Bank lose no time in presenting the note, his view must go to this, that it was the duty of the Bank immediately upon that loan going off, to have presented and insisted on payment of the note. It is sufficient to say that with any such idea the letter of the 22nd September is altogether irreconcileable, and it is unnecessary to observe further upon it. If the learned Judge means to say that the fact of the dissolution of the firm, the fact that Mr. Dickson was employing the Bank to get in the proceeds of his share of the partnership assets and to remit them to him, ought at that time to have caused some greater celerity in presenting the note than otherwise would have been the duty of the holders of it,—their Lordships consider that, although it may be proper to look at the dissolution as a fact in the history of the case, that must be taken in connection with the management of the liquidation of the affairs of the house of Dickson, Tatham, and Company, in the Colony, by Mr. Tatham, and they have already adverted to that which the learned Judge here appears to have overlooked,—the conduct of Mr. Tatham in the Colony with reference to that liquidation.

Their Lordships, therefore, find with regard to the first Judge in this case, that he appears to have attached weight to circumstances in the case which are not, as their Lordships conceive, the circumstances which really must govern the decision, and to have overlooked altogether those material considerations to which reference has already been made.

When the case came before the Appellate tribunal, the part of the Judgment referring to this matter is in these words:—"We think it also clear "that the Bank knew that the arrangement was to "be one for the benefit of the Defendants, as well "as for the benefit of the Bank and Sinne Lebbe.

"When this arrangement was abandoned, and "when all hopes of effecting any similar arrange-"ment, as well as for the benefit of the Bank and "Sinne Lebbe, were at an end, which they cer-"tainly were long before December, 1864, the "Bank had no right to treat this note as a con-"tinuing security as regarded these Defendants." Their Lordships are obliged to say that that appears to them to be in direct opposition to the finding of the Court upon the other issues, which treat this note as a note valid in its inception, and a note which, subject to the one question of whether it was presented within reasonable time, was a continuing security for the Bank against the Defendants. "Whether they had then any rights "at all against this Defendant on the note seems "extremely questionable." A question again thrown on the part of the case which is completely decided and out of controversy by the findings on the other issues. "But they certainly ought to "have either cancelled the note or to have acted "promptly in the matter against the proper parties, "and not to have allowed Sinne Lebbe's affairs to "go from bad to worse without making some at-"tempt to enforce payment or to obtain further "security in respect of this £5000, while they "were vigilant as to other sums in respect of which "they had claims against Sinne Lebbe, but as to "which they had not notes endorsed by the Defen-"dants." We are not in possession of what is referred to here, where the Court says that they were vigilant as to other sums in respect of which they had claims against Sinne Lebbe. There does not appear to be any evidence upon that; but, as regards the other observations of the Court, their Lordships are of opinion that they appear to be made in forgetfulness of this, that the time at which payment of a note of this kind is to be demanded and urged upon the maker must be judged of with reference not merely to the circumstances of the maker, but with reference also to the convenience of the endorser, against whom the second demand would be made. It may be very true that the affairs of Sinne Lebbe were going from bad to worse, but, on the other hand, it may have been the very worst possible thing for the endorser to have precipitated that downward course of the firm of Sinne Lebbe Brothers. And, when we look at

the facts of the case, to which reference has already been made, their Lordships are of opinion that it was not merely for the interests, but that it was the wish of both parties, both the Bank and the partner of Dickson, Tatham, and Company in the Colony, that no undue pressure should take place against Sinne Lebbe Brothers.

Their Lordships, therefore, find that, not upon a dispute of facts, but upon the application of the law to the facts of the case, they are unable to concur in the reasoning of the first Court or of the Court of Appeal in the Colony. They are of opinion that the decision in the Colony cannot be supported. They will humbly advise Her Majesty that the Appeal ought to be allowed, that judgment should be entered for the Appellants for the amount of the note with interest at the rate of the Colony, which their Lordships observe is 9 per cent., with costs in the Court below, and that the Appellants should have the costs of this Appeal.