39, 1952

No. 6 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE HIGH COURT AT IPOH.

BETWEEN

NG SEE HEM (first Defendant) . . . . . *Appellant*

AND

THE OFFICIAL ASSIGNEE FEDERATION OF MALAYA as Official Assignee of the Estate of LIM AH HOOI (Plaintiff) now Adjudicated Bankrupt *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal at Ipoh (Pretheroe Acting C.J. and Thomson and Russell JJ. given the 26th September 1950 dismissing the appeal of the above-named Appellant (first Defendant) from the judgment of the High Court of Ipoh (Hill J.) given the 18th May 1950 whereby judgment was given for the Plaintiff, the above-named bankrupt, for $60,000 together with interest at 18 per cent. per annum from the 7th March 1949 until the 18th May 1950 and thereafter at 8 per cent. per annum until satisfaction, together with the costs of the suit to be taxed as between party and party. p. 38. p. 43. p. 18. p. 20, l. 21.

2. By order of the Court of Appeal of Ipoh (Thomson J.) dated the 22nd December 1950 the above-named Appellant was given final leave to appeal to H.M. the King in Council. p. 46.

3. By order of His Majesty in Council dated the 1st November 1951, the above-named Lim Ah Hooi having been adjudicated bankrupt, it was directed that the above-named Respondent as official assignee of the Estate of the above-named Lim Ah Hooi ought to be substituted in place of the above-named Lim Ah Hooi as Respondent in this appeal. Separate document.

4. Although the matter to be adjudicated upon in this appeal is ultimately one of fact alone it is submitted that the appeal raises questions of the admissibility of evidence, the burden of proof and of the circumstances in which and the principles upon which it is legitimate for an appellate Court to reverse the findings of a Judge of first instance even where the issues involve the credibility of witnesses whom the Judge of first instance had the advantage of observing and hearing at first hand.

APPELLANTS CASE

pp. 1, 2. 5. This action was commenced by plaint dated the 7th March 1949 against the present Appellant and one Toh Kor Yan who, in the events
p. 18, l. 13. which happened, submitted to judgment and took no further part in the proceedings, and who although he was actually present in Court at the trial of the action was not called as a witness by either party. It is believed that no attempt has been made to enforce the judgment against the second Defendant either by the Plaintiff or by his Assignee.

p. 2. 6. By his plaint the Plaintiff, the above-named Lim Ah Hooi claimed $60,000 and ancillary relief alleged to be due on a promissory note dated the 27th October 1946 alleged to have been signed by the two Defendants viz. the present Appellant and the said Toh Kor Yan.

p. 3. 7. By his Defence dated the 26th April 1949 the present Appellant *inter alia* denied the execution of the promissory note and alleged that what purported to be his signature appearing on the face of the alleged note was a forgery.

p. 51 and separate document. 8. The note which was the subject of these proceedings was a document typewritten on a printed form of promissory note and bore on the face of it the date 27th October 1946. Of the two signatures that purporting to be the signature of the present Appellant was in Chinese characters. That purporting to be that of Toh Kor Yan was in Latin characters and bore an additional date in ink immediately below the name. The note bore Malayan stamps to the value of $60 and a stamp purporting to be the stamp of the collecting office at Ipoh of the date 28th October 1946 viz. the day after the purported execution of the note.
p. 9, l. 7. This matter assumed some significance at the trial since all the alleged parties dwelt at Teluk Anson, where the note was presumably alleged to have been executed, and where a stamping office was also available. The note did not bear the words " stamped in due time " required by the provisions of s. 43 of the Stamps Enactment (c. 135 of the Laws of the Federated Malay States revised edition) to be written or caused to be written by the Collector at the time of stamping. No doubt from inadvertence this point was not taken by the learned Judge at the trial, and, presumably because it was thought to be a revenue point, no notice was taken of the omission by counsel on either side. Nevertheless, it is submitted that, quite apart from any question of admissibility, the omission, taken with other peculiarities, is not without its bearing on the question of the genuineness of the document. No evidence was called by either side from the Collector's office at Ipoh to testify to the genuineness of the stamp or the date of stamping, although had it been available, such evidence would undoubtedly have greatly strengthened the Plaintiff's case as tending to establish the existence of the document as early as the 28th October 1946.

p. 5 ff. 9. The only direct evidence of the alleged execution of the instrument was given by the Plaintiff himself. According to his evidence the document was executed in the presence of the three parties to it. No details were given of the place of execution or that the date of execution was the date on the face of the document. Although the document stated that the note was given for " value received " the Plaintiff's evidence regarding

the circumstances attending its execution was somewhat different and took the form of a story which the learned trial Judge characterised as one which in normal times and circumstances one would be inclined to " reject out of hand." Despite the terms of the document the Plaintiff did not allege that the Defendant Toh Kor Yan had received any consideration for the giving of a promissory note to the Plaintiff in the sum of $60,000 or any sum nor was any explanation offered why he should have been willing to do so. Apart from the formal evidence of the Plaintiff no evidence was called to establish the genuineness or otherwise of Toh Kor Yan's signature. The explanation afforded by the Plaintiff of the consideration alleged to have been received by the present Appellant was, to say the least, remarkable. During the Japanese occupation the Plaintiff claims to have saved $60,000 by purchasing British currency with Japanese at a rate at times of $25,000 Japanese for $1,000 British. Where he had obtained the much larger sum of Japanese currency the Plaintiff did not say, but he did say that he buried the $60,000 in British currency in the ground. The Plaintiff claimed that (presumably) in October 1946, he transferred the $60,000 (presumably) from its hole in the ground to the present Appellant for safe custody. He claimed to have done this because he was afraid of blackmail from a secret society supposed to be called the Ang Bin Hoay and who, he said, had blackmailed him before. The Plaintiff did not explain how the society had come to know of the presence of the money nor why the Plaintiff should feel more secure if the money of which the Society was supposedly already aware was deposited with the present Appellant rather than left in its hole in the ground. According to the Plaintiff the alleged note was brought to him by the Defendants together, presumably (although again not expressly so stated) as a record of the transaction and security for repayment. The Plaintiff offered no explanation why the transaction should be recorded by a promissory note and not for example by a receipt, or a simple memorandum stating what had happened or why the second Defendant should have executed it at all. The Plaintiff gave no details of any conversations accompanying either the alleged deposit of the money or the alleged execution of the note, but he claimed that the present Appellant had sworn on oath of gratitude, why he did not say, and promised to repay the money even if the note was lost. At a later stage in his evidence the Plaintiff gave an earlier disputed loan of $5,000 as the occasion of the oath. No attempt was alleged to negotiate the note, nor was any explanation offered as to where it had been kept, apart from the fact that the Plaintiff said the note had become torn as he had it in and out of his pocket and that it had become wet by rain. No one was called who claimed to have seen the note at any date prior to 1948, and only one witness, Kong, claimed to have seen it at all prior to the issue of proceedings; but his evidence on this point was possibly contradicted by that of the Plaintiff himself.

p. 19, l. 14, ff.
p. 6, l. 17.
Ibid.
Ibid.
p. 5, l. 46.
p. 5, l. 41.
p. 5, l. 42
p. 6, l. 41.
p. 6, l. 7.
p. 11, l. 37.
p. 6, l. 12.
p. 6, l. 11; but see judgment, p. 19, l. 46.

10. In addition to his own evidence the Plaintiff sought to support the authenticity of the note by the testimony of a Government pensioner one Chong Wai Wong who claimed to be an expert in handwriting and who testified to his belief that the author of the disputed signature on the note was the same as that of a number of undisputed signatures of the present Appellant. The learned Judge however, and, it is submitted, rightly, rejected the claim of Chong Wai Wong to be an expert, and was

p. 8.

unable to detect from an examination of the various documents themselves any conclusive indication to show whether the signature was genuine or a forgery.

p. 19, ll. 9, 10.

11. The remainder of the evidence called on behalf of the Plaintiff was circumstantial, and falls into two groups. The first of these groups consisted in the evidence of one A. M. Sawall, a petition writer and land-broker, and of one Chai Pak Kong, a dentist and dealer in patent medicines. Both these purported to give accounts, at some points, it is submitted startlingly dissimilar, and at others, it is submitted, suspiciously resembling one another, of a conversation or series of conversations alleged to have been held with the present Appellant. A substantial part of this evidence, it is submitted, was pure hearsay, and should never have been admitted. So far as it was not hearsay, it related to an alleged statement by the present Appellant that he had paid one sum back to the Plaintiff and another sum to the alleged secret society by way of blackmail. In many details, however, the testimony of the two witnesses differed. Thus Sawall claimed to have arranged the meeting at Chai Pak Kong's house at which, apparently, the admissions were alleged to have been made; but Kong, describing, it is submitted, the same meeting, said: "I called him (viz. the present Appellant) to my house." The result of the alleged conversation was alleged by Sawall to have been reported to the Plaintiff by himself, but Kong made the same claim on his own behalf, and both gave circumstantial accounts in similar terms describing how the Plaintiff received the news, but neither referred to the presence of the other, or suggested that the Plaintiff had shown any signs of having received the identical information from any source than himself. Both were confronted with affidavits sworn on behalf of an interlocutory application which gave somewhat startlingly dissimilar accounts of what must be presumed to be the same series of conversations. A number of other divergencies between the witnesses was noted in the Memorandum of Appeal in the Court of Appeal (Record p. 22).

p. 9.
p. 11.
cf. p. 9, l. 26.
p. 9, l. 34 ff.
p. 10, l. 4 ff.
p. 10, l. 10.
p. 11, ll. g, ff.
p. 11, l. 19.
p. 11, l. 25.
p. 11, l. 27.
p. 9, l. 32.
p. 11, l. 17.
p. 9, l. 32.
p. 9, l. 33.
p. 11, l. 11.
p. 9, l. 34.
p. 11, l. 19.
pp. 54, 55.

12. The remaining witness for the Plaintiff was a teacher in the Anglo-Chinese School named Yeow Lai Yin. Although his evidence had apparently some influence with the learned Judge it is submitted that his testimony was irrelevant and should not have been admitted. During the hearing a subsidiary issue developed between the parties as to the nature and extent of previous transactions between the Plaintiff and the present Appellant. It was conceded that the Plaintiff with some others had lent the present Appellant a total sum of $2,000 during the Japanese occupation to enable the present Appellant to pay some demand by the Japanese authorities but the Plaintiff claimed and the Defendant denied a further loan by the Plaintiff to the Defendant for the same purpose in the sum of $5,000. The Plaintiff conceded that both loans had been repaid. The only relevance, it is submitted, to any of the matters in issue in the proceedings is that the Plaintiff in one of his two inconsistent accounts of the occasion of the "oath of gratitude" appears to have alleged that this was the making of the $5,000 loan. The sole purpose of the evidence of Yeow Lai Yin was to prove the truth of the alleged $5,000 loan. Strictly admissible or not, it is submitted that this evidence was remote from the central issue in the case.

p. 5, l. 23.
p. 13, l. 3.
p. 6, l. 41.
p. 6, l. 10.

13. The present Appellant gave evidence denying all knowledge of the promissory note prior to the commencement of the proceedings, and denying any knowledge of the witnesses Sawall and Kong. The original alleged deposit and the alleged negotiations for a settlement were all explicitly denied by the present Appellant. pp. 12 ff.

14. The Defendant also called the Manager of the Overseas Chinese Bank, the maker of certain photographs of documents, and the Chief Clerk of the Teluk Anson Land Office. It is not thought that the testimony of any of these witnesses is material for the purposes of this appeal. In addition to these the Appellant called Puran Singh Mamak, as a handwriting expert, but since his qualifications as an expert, were rejected by the learned Judge the only value of his testimony and of the document in which he embodied certain of his more detailed observations lies in the extent to which they may be confirmed by a comparison of the various photostat documents exhibited. The purpose was to show the disputed signature a forgery. p. 15, l. 2. p. 15, l. 21. p. 16, l. 13. pp. 16, 17 and p. 69.

15. In his judgment after rejecting the claims of any of the witnesses to be experts in handwriting, and saying that after prolonged examination of the documents he was unable to come to a positive conclusion thereon and having considered the oral evidence of the parties, the learned Judge described the Plaintiff's story as an unusual one, so much so, he added "that in normal times and circumstances one would be inclined to reject it out of hand." He went on, however, to say :— p. 18. p. 18, l. 23. p. 18, l. 18. p. 19, ll. 9, 10. p. 19, l. 13

> "For too long now conditions in this country have been far from normal, and it is in the light of the abnormal conditions prevailing at the time that the Plaintiff's case must be considered."

16. Unhappily, in making this observation, it is submitted that the learned Judge failed to observe that the abnormalities of the time, whatever these may have been, could really offer no explanation of the inherent improbabilities in the Plaintiff's story, and, indeed, from one point of view might reasonably be said to have enhanced them since the alleged transfer to the Plaintiff of a sum of $60,000 previously safely underground, and the taking of a promissory note in exchange can at best have at least doubled, and in some circumstances could only serve to multiply the possibility of loss by blackmail the reduction of which was the supposed object of the alleged transaction. Moreover the abnormality of the times it is submitted, is at least as much reason for scrutinising unlikely stories with an additional degree of scepticism as for accepting such stories with an added measure of credulity.

17. However it is submitted that, when the Judge came to the conclusion as he ultimately did :—

> "I have come to the decision to accept the evidence of the Plaintiff and his witnesses"

he was not simply recording a view based on the demeanour of these witnesses in their spoken testimony but stating a conclusion arrived at in part after misdirecting himself as to the relevance of the alleged prevalence of abnormal conditions.

p. 18, l. 17. 18. It is respectfully submitted that although the learned Judge seems fully to have considered the gravity of the case to the parties he nowhere appears to have directed himself explicitly to the serious character of the burden of proof which falls to be discharged by a Plaintiff in such matters. It is respectfully submitted that had he done so he might well, in the light of his remarks concerning the general nature of the Plaintiff's case, have come to a different conclusion. In assessing the weight to be attached to the submissions made on behalf of the present Appellant
p. 19, ll. 39 ff. the learned Judge used language which, it is submitted, is at least consistent with the view that he was treating the Appellant as under an obligation to establish affirmatively that the Plaintiff's case was a fabrication. It is submitted that it is at least unfortunate that much of the evidence of the witnesses Kong and Sawall was in the nature of hearsay and that the evidence of Yeow Lai Yin on which the learned
p. 19, l. 34. Judge appears to have placed some reliance was not really relevant to any issue in the proceedings. In the premises it is submitted that it is open to an appellate Court to review the evidence and that the only correct conclusion to form in assessing the evidence correctly is that the Plaintiff had failed to discharge the burden which rested upon him.

19. The judgment of the Court of Appeal was given by Pretheroe, Acting C.J. This Judgment concedes, it is submitted correctly (if by a positive conclusion is meant a conclusion as to what had really happened),
p. 41, l. 15. that on the printed evidence it is not possible to come to a positive conclusion, but treated, it is submitted incorrectly, the basis of the learned Judge's judgment as an appreciation of the demeanour of the oral witnesses and the Court therefore declined to intervene.

20. The Appellant submits that this judgment and that of the trial Judge should be reversed, and that judgment should be entered for the Appellant with costs alternatively that a new trial be had between the parties for the following amongst other

REASONS

(1) BECAUSE the inherent improbabilities and inconsistencies of the Plaintiff's case were such that no reasonable Court properly directing itself as to the burden of proof ought to have reached the conclusion that the Plaintiff had discharged the burden which rested upon him.

(2) BECAUSE there are good reasons from the contents of the judgment of the learned trial Judge to believe that he in fact misdirected himself as to the burden of proof.

(3) BECAUSE the learned trial Judge was in error in directing himself that the abnormal conditions in Malaya in any way reduced the improbability of the Plaintiff's story.

(4) BECAUSE the learned trial Judge failed to direct himself that the various inconsistencies in the story of the Plaintiff's witnesses while falling short of proof of a

conspiracy between them might none the less be such as to cast a reasonable doubt on an otherwise admittedly inherently improbable story.

(5) BECAUSE the learned trial Judge admitted and was influenced by irrelevant evidence and admitted hearsay evidence.

(6) BECAUSE the instrument sued on was inadmissible evidence and/or void in law.

(7) BECAUSE the learned Judge's conclusions were wrong, and plainly unsound, and because the grounds given by him for reaching such conclusions were unsatisfactory by reason of material inconsistencies and inaccuracies.

(8) BECAUSE it appears unmistakably from the evidence that in reaching such conclusions the learned Judge did not take proper advantage of having seen or heard the witnesses and failed to appreciate the weight and bearing of the circumstances admitted or proved.

(9) BECAUSE the Court of Appeal was in error in holding that in the circumstances it was not free to reverse and should not in fact reverse the learned Judge's decision.

HAILSHAM.

No. 6 of 1951.

In the Privy Council.

ON APPEAL

from the Supreme Court of the Federation of Malaya in the High Court at Ipoh.

BETWEEN

NG SEE HEM *Appellant*

AND

THE OFFICIAL ASSIGNEE FEDERATION OF MALAYA as Official Assignee of the Estate of LIM AH HOOI now Adjudicated Bankrupt *Respondent.*

Case for the Appellant

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