that an adoption can in no case operate to defeat an interest once vested.

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I would reverse the decree of the court below, with costs.

KEMBALL, J.:—I concur.

Special Appeal No. 117 *of* 1870.

Feb. 22.

DAYA'BHA'I DI'PCHAND .....*Appellant.*
MA'NIKLA'L VRIJBHUKAN .....*Respondent.*

Shares—Sale for future delivery—Notice by Purchaser that he will not accept—Readiness and Willingness of Vendor to deliver—Pledge of Shares to a third person.

Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares.

Semble. The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so.

THIS was a special appeal from the decision of the Judge of the District of Súrat, confirming the decision of the Ṣadr Amín of Broach.

Dayábhái Dípchand instituted this action to recover the sum of Rs. 3,825, being the balance due on account of forty shares of the Broach Bank and Finance Corporation, Limited, alleging that the defendant, Máṇiklál, had entered into an agreement with him on Phálgun Vad 7th, Samvat 1921 (19th March 1865) to pay for, and take delivery of, the said shares from him on or before the 15th of July following, but that the defendant, Máṇiklál, had refused to take delivery when the shares had been tendered to him on the day agreed on.

The plaintiff, accordingly, sued to recover the contract value of the shares less the proceeds from the sale of the shares.

The defendant, Máṇiklál, admitted the execution of the agreement, but said that it was a *saṭṭá*, or wagering contract,

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and was void by law; further that the plaintiff, Dayábhái, had not been ready or able to perform his part of the contract, by delivering the shares as agreed upon; and, consequently, that the action could not be maintained.

The Ṣadr Amín of Broach rejected the claim of the plaintiff on the grounds that the plaintiff, Dayábhái, had not actually tendered the shares to the defendant, Máṇiklál, on the fixed day, and that he had not been ready and willing to do so, as the shares allotted to the plaintiff were in the custody of the said corporation on the appointed day, and long afterwards, and as the deed of the corporation prohibited the plaintiff, Dayábhái, from assigning such encumbered shares.

On appeal the District Judge of Súrat laid down two points for consideration:—(I.) Whether the lower court wrongly found that the plaintiff had failed to prove his readiness to perform his part of the contract, such being a condition precedent to his right of action; and (II.) Whether the lower court improperly, and to the plaintiff's material prejudice, rejected any portion of his evidence. On both these points he found for the respondent, Máṇiklál. "The lower court found upon the facts that the plaintiff was not able and willing to perform his part of the contract, and I quite concur in that finding: for, setting aside other facts from consideration, it is perfectly clear that the plaintiff was not *primâ facie* able and willing, so long as the bank's lien remained undischarged, to make a valid transfer of the shares."

The plaintiff appealed from the decision of the District Judge of Súrat, and the appeal was argued before WESTROPP, C.J., and LLOYD, J.

Macpherson (with him *Chunilál Máṇiklál*), for the appellant:—Both the lower courts have decided against the plaintiff, on the ground that he had mortgaged the shares, and was, therefore, not in a position to sell the shares without paying off the mortgagee. The vendor, however, could have, with the vendee's money, paid off the mortgagee and made over

the shares to the vendee. The shares had gone down and become worthless in July, and the mortgagee would, therefore, have been willing to part with the shares on payment of the agreed price by the vendee. It appears that notice was sent by the plaintiff on the 9th of July, six days before the day agreed upon for delivery, of his readiness to deliver the shares. The defendant sent a reply on the 13th of July, in which he urged that the contract was a wagering transaction—that no particular shares were agreed to be sold. By this reply the defendant refused to perform the contract two days before the day agreed upon for the delivery. The fact of the mortgage could not prejudice the plaintiff's claim to recover on the contract, for it appears the mortgagee had delivered the shares to the plaintiff for tender to the defendant.

Leith (with him *Shántárám Náráyaṇ*), for the respondent:—The evidence on which the appellant relies to show that the mortgagee was willing to join in tendering the shares to the defendant has been disbelieved by the lower court. The mortgagee in this case was the bank itself, and the vendor should have obtained the bank's consent before a legal and valid transfer could be made.

WESTROPP, C.J.:—It being admitted on both sides that the appellant, on the 9th of July 1865, gave notice to the respondent, Máṇiklál, of his (the appellant's) readiness and willingness to deliver the shares, the subject of the contract, contained in the agreement of the 19th of March 1865, upon the due date for the delivery of the shares, namely, the 15th of July 1865; and that the respondent, on the 13th of July 1865, gave a notice in reply to the appellant, Dayábhái, that he, the respondent, for reasons wholly unconnected with the readiness and willingness of the appellant to deliver such shares, would not accept the shares (on which reasons the respondent did not rely before the District Judge), the issue as to the readiness and willingness of the appellant to deliver the shares on the 15th of July 1865 was immaterial, as the respondent had, by his conduct in giving the said notice in reply of the 13th of July 1865, exonerated the appellant

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from giving proof of such readiness and willingness (*a*). Even if that issue had been material, the court is of opinion that the District Judge gave a reason insufficient in point of law to uphold his finding that the appellant was not ready and willing to deliver the shares. The mere fact, standing alone, that the shares were pledged to the Broach Bank and Finance Corporation, Limited, was not sufficient proof that the appellant was neither ready nor willing to deliver the shares, as there is nothing to show that the Broach Bank and Finance Corporation, Limited, would not have assented to the delivery of the shares by the appellant to the respondent. In fact, the reasonable probability is that they would have gladly assisted the appellant to the uttermost, as the shares had fallen in market-value far below the contract price of the 19th of March 1865, and the only mode of realizing the latter price was by forcing the respondent to perform that contract. However, the court does not decide this case upon the issue as to readiness and willingness, but on the ground that the making and non-performance of the contract by the respondent are not denied, and that the issue as to readiness and willingness is immaterial, the respondent having, shortly before the arrival of the day for delivery, notified to the defendant (respondent) that he would not accept the shares, and not having, before the District Judge, relied upon or established any of the reasons put forward in that notification for declaring that he would not accept the shares. The same grounds for this court's decision render it unnecessary to say whether any actual tender of the share-certificates was made or was necessary. The court reverses the decisions of the courts below, and makes a decree for the appellant, Dayábhái, for Rs. 2,970 damages, and costs in the courts below, but no costs of this special appeal.

(*a*) *Ripley* v. *McClure*, 4 Exch. 345, 359; *Danube and Black Sea Rail. Co.* v. *Xenos*, 11 C. B., N. S., 152; 13 *Ibid.* 825; S. C. 31 L. J., C. P. 84, 284; *Cort* v. *Ambergate Rail. Co.*, 17 Q. B. 127; 20 L. J., Q. B. 460; and see *Jones* v. *Barkley*, 2 Douglas 684 and 8 East 437; 7 M. & W. 474; 1 T. R. 638; 1 C. B. 75; 8 C. B. 751, 762.