

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

IN RE THE INDIAN COMPANIES ACT X OF 1866.

PURMANUNDASS JIVANDASS, CLAIMANT, v. H. R. CORMACK
AND OTHERS, OFFICIAL LIQUIDATORS.

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July 19, 21,
22, 25, 28.

Company—Winding up—Liability of company for loan to secretary, treasurer, and agent—Principal and agent—Undisclosed principal—Election—Indian Contract Act (IX of 1872), Sections 230, 233, 234.

By the Memorandum and Articles of Association of the New Fleming Spinning and Weaving Company, N. K. was appointed secretary, treasurer, and agent of the company with power to raise or borrow from time to time, in the name or otherwise on behalf of the company, such sums of money as he might think expedient by bonds, debentures, or promissory notes, or in such other manner as he might deem best; and for the purpose of securing the repayment of any money so borrowed to make any arrangement which he might deem expedient by conveying or assigning away property of the company to trustees or otherwise. N. K. was also secretary, treasurer, and agent of four other mill companies in Bombay.

On the 31st October, 1878, the directors passed the following resolution:—

“That the unallotted shares be filled up in the name of Nursey Kessowji, Esquire, secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company.”

On the 11th November, 1878, P. advanced a sum of Rs. 1,00,500 upon the terms contained in a Gujarati writing of that date, and signed by N. K. In this document N. K. acknowledged the receipt of the money for which 335 shares in the New Fleming Spinning and Weaving Company were duly handed over as security, and he agreed to repay it within three months. The last clause in the agreement stated that it was “duly agreed to and approved by him (N. K.) and his heirs and representatives.” As an additional security, P., when advancing the loan, obtained from K. N. (father of N. K.) a guarantee in the following terms:—

“To Thuker Purmanundass Jivandass.

“Written by Sha Kessowji Naik.

“To wit:—This day Sha Nursey Kessowji has received from you Rs. 1,00,500, namely, one lakh and five hundred, having deposited, by way of security, 335, namely, three hundred and thirty-five ‘shares’ of ‘The New Fleming Spinning and Weaving Company, Limited.’ If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an ‘indemnity bond’ on stamped paper through your vakil (solicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay, the 11th of November in the English year 1878.”

On the evening of the day on which the loan was made, viz., 11th November 1878, but without the knowledge of K. N., it was agreed between N. K. and P. that the time for the repayment of the loan should be extended to six months. In

December, 1878, N. K. became insolvent, and on 28th December, 1878, a Petition was presented to the High Court to wind up the New Fleming Spinning and Weaving Company. On the 30th December, P. through his solicitors wrote a letter to the company, stating that N. K. had obtained a loan from him of Rs. 1,00,500 on behalf of the company, and inquiring whether the fact appeared in the company's books. To this letter he received a reply signed by "K. N., Director," stating that the loan appeared in the books in P.'s name. On the 17th January, 1879, an order was made for the winding up of the New Fleming Spinning and Weaving Company, and on the 4th February, 1879, P. gave notice to the official liquidators of the company of his claim against the company for the money advanced by him on the 11th November, 1878. In March, 1879, he filed a suit against K. N. to enforce his guarantee, but was unsuccessful, the Court holding that, by extending the period of the loan to six months, the agreement of the 11th November, 1878, had been materially varied without K. N.'s knowledge, and that K. N. was consequently discharged. On the 24th April, 1879, P. filed his affidavit in support of his claim against the company. The company resisted the claim.

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Held (1) that the directors had power, under the Memorandum and Articles of Association, to authorize N. K. to borrow money on behalf of the company, and that they had done so, and with that object had entrusted him with the unallotted shares.

(2) That when P. advanced the loan to N. K. he was led to believe that N. K. was obtaining it on behalf of the four mill companies of which he was secretary, treasurer, and agent, but that P. was not aware and was not informed for which of the said companies the loan was obtained, and that the money was, in fact, advanced to N., as to an agent acting on behalf of an undisclosed principal.

(3) That P. when he discovered that the money was obtained for the New Fleming Spinning and Weaving Company, was entitled to claim against the company and to rank as a creditor of the company for the amount advanced to N. K. with interest from the date of the loan, viz., 11th November, 1878, to the date of the presentation of the petition to wind up the company.

THIS was a claim by Purmanundass Jivandass in the winding up of the New Fleming Spinning and Weaving Company to rank as a creditor for the sum of Rs. 1,00,500, which sum he alleged he had lent to Nursey Kessowji, the secretary, treasurer, and agent of the company, for the use of the said company on the 11th November, 1878. Nursey Kessowji was also secretary, treasurer, and agent of three other mill companies in Bombay.

The New Fleming Spinning and Weaving Company, Limited, carried on business in Bombay, and, by the Memorandum and Articles of Association, Nursey Kessowji, who carried on an extensive business as merchant in Bombay under the firm of Nursey Kessowji and Company, was appointed the secretary,

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treasurer, and agent for a term of twenty-five years, "with full power and authority to enter into such contracts and agreements as he may think proper for the company." The Articles of Association also provided (*inter alia*) that the "following powers and authorities are expressly given to and conferred upon the Board and the secretary, treasurer, and agent and his nominee:—

"To raise or borrow from time to time in the name or otherwise on behalf of the company such sums of money as they from time to time think expedient either by way of sale or mortgage of the whole or any part of the property of the company or by bonds, debentures, or promissory notes, or in such other manner as they deem best, and for the purpose of securing the repayment of any money so borrowed with interest to make and carry into effect any arrangement which they may deem expedient by conveying or assigning any property of the company to trustees or otherwise."

From the evidence given at the hearing of the claim it appeared that on the 6th August, 1878, the directors of the company passed the following resolution:—

"Resolved—That Messrs. Nursey Kessowji and Company be the bankers of the company, and that interest payable by them on cash balance due by them to the company be annas 8 per cent. per mensem, and interest payable to them on cash balance by the company be annas 12 per cent. per mensem."

At another meeting of the directors, held on the 31st October, 1878, the following resolution was adopted:—

"Resolved—That the unallotted shares be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company.

"The number of certificates of shares with the names of mortgagees be recorded at the first meeting of the Board held after such transaction is done."

It was further proved that persons acting on behalf of Nursey Kessowji had been, for some days prior to the 11th November, 1878, endeavouring to obtain the loan of the money in question

from the claimant. During the negotiations it was represented to the claimant that the money was wanted for the company, which was then in difficulties; that, finally, the claimant agreed to advance the sum required on the security of 335 shares in the company, the market value of which was then Rs. 400 each. The terms upon which the loan was advanced, were contained in the following Gujarati agreement executed by Nursey Kessowji to the claimant:—

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“To Shet Purmanundass Jivandass.

“Written by Sha Nursey Kessowji—I give in writing to you as follows:—I have this day received from you Rs. 1,00,500, namely, one lakh five hundred in cash on the following conditions:

“First as follows:—Interest for the said Rs. 1,00,500 is fixed at Rs. $\frac{3}{4}$, namely, rams (*i. e.* annas) twelve per cent. per mensem.

“Second as follows:—The time (for the repayment) of the said money is fixed at months 3, namely, three; should I pay within that time the money received from you nevertheless calculating the interest for the above-mentioned fixed period⁽¹⁾ I am duly to pay you (the same).

“Third as follows:—As security for the repayment of the said Rs. 1,00,500, shares 335, namely, three hundred and thirty-five, of the New Fleming Spinning and Weaving Company, Limited, have been deposited at your office, and the (money) has been received. As to the same when I shall pay your said money with the interest, you are duly to transfer the said shares to me. And whatever expenses (namely for) the transfer-fee, &c., there may be incurred, I am duly to pay.

“Fourth as follows:—The time (for the repayment) of the said money is fixed at months 3: namely, three, on the expiration of the said period whenever you may demand payment of the said money, I am duly to pay (the same) with interest; should I fail to pay the same, you are to sell the said shares at the market rate by private contract or by public auction, according as you may find it convenient without (your) sending me a notice, and recover your money with interest. And should you demand margin money on the price of the said shares decreasing, I am

(1) Meaning that interest for the whole period is to be paid.

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duly to pay (the same) ; should I fail to pay (the same), you are at liberty to dispose of the said shares at the market rates either by private contract or by public auction according as you may find it convenient without (your) sending me a notice. On this score I am not to raise any objection. And on the sale of the said shares as to whatever expenses (namely) for stamps, &c., there may be incurred, and on recovering your money with the interest and expenses as to whatever the deficit or the surplus may be, I am duly to give and take credit for the same.

“ Fifth as follows :—The market value of the said shares is at present Rs. 400, namely, four hundred ; should (the same) become less than that (by) Rs. 25, namely, twenty-five, and should I without notice not pay margin money, then you may sell the above-mentioned shares at the market rate or you may wait. As to that I am not to raise any objection.

“ Sixth as follows :—The risk and liability with respect to the said shares rest on my head.

“ Seventh as follows :—The numbers of the said shares are from 3221 to 3555.

“ Eighth as follows :—The said shares 335 in my name are given to you ‘blank’. The risk and liability with respect to the same rest on my head.

“ Ninth as follows :—Interest on the said money shall duly accrue from the 11th November in the year 1878.

“ According to these particulars, agreeably to the above writing, I have received the money in cash in full from you, and have made and given this writing. It is duly agreed to and approved by me and my heirs and representatives—Bombay the date 11th November, 1878. ”

As a further security for the loan, the claimant obtained a guarantee from Kessowji Naik, the father of Nursey Kessowji, in the following terms :—

“ To Thuker Purmanundass Jivandass.

“ Written by Sha Kessowji Naik.

“ To-wit :—This day Sha Nursey Kessowji has received from you Rs. 1,00,500, namely, one lakh and five hundred, having depo-

sited, by way of security, 335, namely, three hundred and thirty-five 'shares' of 'The New Fleming Spinning and Weaving Company, Limited.' If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an 'indemnity bond' on stamped paper through your vakil (sollicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay the 11th of November in the English year 1878.

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Both the above documents were executed at Kessowji Naik's bungalow on the 11th November, 1878.

On the evening of the same day, and without the knowledge or sanction of Kessowji Naik, it was agreed between Nursey Kessowji and the claimant that the time for the repayment of the loan should be extended for a further period of three months. This agreement was in writing, and was as follows:—

“To Thuker Purmanundass Jivandass written by Sha Nursey Kessowji—to wit. On this day having borrowed from you Rs. 1,00,500, namely, one lakh and five hundred in cash, and having given, by way of security, 335, namely, three hundred and thirty-five, shares of the New Fleming Spinning and Weaving Company, Limited, I have received (the said sum) the time thereof has been fixed for 3, namely, three months. But with your and my consent it is enlarged by further time of 3 (three) months. Sha Nursey Kessowji, I will (a) give credit for the interest thereof at the rate of 1, namely, (one) (b) per cent., Sha Nursey Kessowji. In all, the time in respect of the above-mentioned money is fixed for 6, namely, six months. Should I pay the money within the said time (still) I will without any objection truly give you credit for interest for 6, namely, six months. Bombay, dated the 11th November, 1878.”

After this document had been executed, the money was paid to Nursey Kessowji by the claimant, and the share certificates handed over as security.

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In the month of December, 1878, Nursey Kessowji became insolvent, and on the 28th December, 1878, a petition was presented to the High Court to wind-up the New Fleming Spinning and Weaving Company. On the 30th December, 1878, Messrs. Macfarlane and Gilbert, the claimant's solicitors, wrote the following letter to the Secretaries of the Company:—

"30th December, 1878.

"The Secretaries of the New Fleming Spinning and
 Weaving Company, Limited.

"Gentlemen,

"We are instructed by our client, Mr. Purmanundass Jivandass, to ask if the sum of Rs. 1,00,500, borrowed by Messrs. Nursey Kessowji and Company from our client on or about the 11th day of November last, appears in the books of the New Fleming Spinning and Weaving Company, Limited, to the credit of our client.

"We understand that the above sum of Rs. 1,00,500 was borrowed by Messrs. Nursey Kessowji and Company on behalf of the above company.

"Please confirm this.

"An early answer will oblige.

Your obedient Servants,
 (Signed) MACFARLANE AND GILBERT."

To this letter they received the following reply:—

"10th January, 1879.

"Messrs. Macfarlane and Gilbert.

"Dear Sirs,

"We beg to acknowledge receipt of your letter dated 30th December last, addressed to the secretary of this company, inquiring whether the sum of Rs. 1,00,500 borrowed by Messrs. Nursey Kessowji and Company from your client, Mr. Purmanundass Jivandass, appeared in the books of this company; in reply we beg to confirm that the above said sum appears in the company's books in your client's name.

"The clerk who handed us the letter was shown the entry to this effect.

Yours faithfully,
 (Signed) KESSOWJI NAIK,
 Director."

On the 10th January, 1879, Nursey Kessowji and Company filed their petition in the Insolvent Court, and on the 17th January, 1879, an order was made by the Court to wind-up the New Fleming Spinning and Weaving Company.

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On the 4th February, 1879, the claimant's solicitors wrote the following letter to the official liquidators of the company:—

“ Dear Sirs,

“ On behalf of Mr. Purmanundass Jivandass, of Hornby Row, Fort, Bombay, we beg to give you notice that he claims from the company a sum of Rs. 1,00,500 and interest thereon at 9 per cent. per annum from the 11th November, 1878, under an agreement dated that day, and signed by Nursey Kessowji, the secretary, treasurer, and agent of the company. Our client holds, as further security for this advance, 335 and 50 shares in the company, and he also holds the personal guarantee of Mr. Kessowji Naik for the same.

“ Dated this 4th day of February, 1879.

Yours truly,

(SIGNED) CHALK AND WALKER.”

On the 24th April, 1879, the claimant filed his affidavit in proof of his claim against the company.

He had already endeavoured to enforce the guarantee given by Kessowji Naik. In March, 1879, he filed a suit (No. 258 of 1879) against Kessowji for this purpose. Kessowji, however, had discovered the agreement of the 11th November, 1878, between the claimant and Nursey Kessowji by which the time of the loan had been extended to six months. He accordingly filed a written statement contending that the claimant's suit was premature. The claimant on the 17th June, 1879, obtained leave to withdraw the suit, with liberty to bring a fresh one on or before the 24th June, 1879.

On the 18th June the claimant filed another suit (No. 385 of 1879) against Kessowji Naik to enforce his guarantee against him. In that suit, however, he failed. The learned Judge (Sargent, J.) held that the agreement between the claimant and Nursey Kessowji guaranteed by Kessowji Naik had been varied subse-

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quently to the guarantee without his knowledge or consent, and that he (Kessowji Naik) was, therefore, discharged. The decree in that suit was confirmed in appeal.

In reply to the claimant's affidavit of proof against the company, the official liquidators contended that the loan was made to Nursey Kessowji personally, and not to the company; that the claimant had, at all events, elected to give credit to Nursey Kessowji and to Kessowji Naik as guarantor, and that he sought to charge the company only after he had failed to recover the said loan from Nursey Kessowji or from Kessowji Naik.

Lang and *Telang* for the claimant.—Nursey Kessowji had ample authority to borrow on behalf of the company, and the claimant knew it. The loan was clearly for the company. Both Nursey Kessowji and the company are liable: Indian Companies Act (X of 1866), sec. 233. Even though the claimant gave credit to Nursey, he is not precluded from suing the company if it was the principal: Pollock on Contracts (3rd ed.) 109; Story on Agency, secs. 160 A, 288-289. The law in force here as to the liability of principal and agent is contained in sections 230-234 of the Contract Act. Assuming that the company is the principal, the claimant has done nothing to disentitle him from suing: *Calder v. Dobell*(1); *Curtis v. Williamson*(2); Pollock on Contracts (3rd ed.), 114.

Marriott (Advocate General) and *Iverarity* for the company.—The loan by the claimant was to Nursey Kessowji personally, not to the company, and the company is not liable. The claimant gave credit to Nursey and to his father and not to the company. Further, we contend that the claimant made his election to charge the agent, and cannot now charge the company: *Paterson v. Gandesequi*; 2 Smith's Leading Cases (6th ed.) 313; Indian Contract Act (IX of 1872), sec. 234; Story on Agency, sec. 446; *Smethurst v. Mitchell*(3). The company had no power to mortgage unallotted shares, and, therefore, could not appoint Nursey Kessowji their agent to mortgage them. Counsel referred to Memorandum and Articles of Association; Brice on *Ultra Vires*, 157;

(3) L. R. 6 C. P. 486.

(2) L. R. 10 Q. B. 57.

(3) 1 E. & E. 622; S. C. 23 L. J. R. B. 241.

Balfour v. Ernest(1); *Turquand v. Royal British Bank*(2); *Ridley v. Plymouth Banking Company*(3); *Ashbury Railway Company v. Riche*(4); *Phoenix Life Assurance Company*(5).

Cur. adv. vult.

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September 13. BAYLEY, J.—This is a claim by Purmanundass Jivandass, who carries on business at Hornby Row, in the Fort, to rank as a creditor of the New Fleming Spinning and Weaving Company, Limited, in Liquidation, in respect of a sum of Rs. 1,00,500, which on the 11th November, 1878, he lent to Nursey Kessowji, then the secretary, treasurer, and agent, and also the banker of the said company, repayable in three months with interest at 9 per cent. per annum. To secure this loan, Nursey Kessowji executed a Gujarati agreement containing various provisions, and deposited with Purmanundass 335 shares in the New Fleming Company, the advance being made at the rate of Rs. 300 per share, such shares being then worth Rs. 400 each in the market. By a Gujarati contract of the same date, but on unstamped paper; Kessowji Naik, the father of Nursey Kessowji, guaranteed the repayment of the above loan, and on the 23rd of the same month executed a writing duly stamped, and which was in the same terms as the unstamped guarantee of the 11th November.

Subsequently to the execution of the above-mentioned documents by Nursey and Kessowji on the 11th November, but without the knowledge or sanction of Kessowji, and at a later period of the same evening, Nursey and Purmanundass, by a document dated and signed on the 11th November, agreed that the time for repayment of the loan should be extended for a further period of three months; and, after such paper had been duly signed by Nursey, the money was paid, excepting Rs. 800, for which Purmanundass gave a promissory note payable on demand.

Nursey Kessowji became insolvent at the end of December, 1878, and on the 28th December, 1878, a petition was presented to the High Court to wind-up the New Fleming Company. On the 30th December, 1878, Purmanundass' solicitors, Messrs. Macfarlane and Gilbert, wrote to the secretaries of the New

(1) 5 C. B. N. S. 600.

(3) 2 Ex. 711.

(2) 6 El. & Bl, 327.

(4) L. R. 7. H. L. 653.

(5) 2 J. & H. 441.

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Fleming Company, and asked if the sum of Rs. 1,00,500 borrowed on the 11th November, appeared in the books of the New Fleming Company to the credit of their client, and stating that they understood that such sum was borrowed by Messrs. Nursey Kessowji and Company on behalf of the New Fleming Company. By a letter dated the 10th January, 1879, headed the New Fleming Spinning and Weaving Company, Limited, and addressed to Messrs. Macfarlane and Gilbert, signed only by Kessowji Naik, director, though evidently intended to be signed by other directors as well, it was stated that they begged to acknowledge the receipt of the letter dated the 30th December addressed to the secretary of the company, and in reply they begged to confirm that the above sum appeared in the company's books in Purmanundass' name, and that the clerk who handed them the letter was shown the entry to that effect. On the 10th January, 1879, Nursey Kessowji and Company filed their petition in the Insolvent Court.

On the 11th January, 1879, Messrs. Macfarlane and Gilbert wrote to the New Fleming Company, stating that the shares held by Purmanundass were insufficient to cover the advance; that he had received 335 shares of the above company as a deposit in the first instance, and afterwards a further deposit of 50 shares more; and that they (Messrs. Macfarlane and Gilbert) were informed by their client that such shares were that morning quoted at Rs. 40 a share, and that they were instructed to ask the New Fleming Company to state if they would pay the amount due and take over the shares held by Purmanundass, and intimating that, should they not hear from the company satisfactorily in reply within twenty-four hours, Purmanundass would sell the share without further reference, and would assert his claim as he might be advised.

On the 17th January, 1879, an order was made by Mr. Justice Green to wind-up the New Fleming Company.

On the 4th February, 1879, by a letter of that date addressed by Purmanundass, through their solicitors (Messrs. Chalk and Walker) to Messrs. H. R. Cormack, Nowroji Furdunji and M. R. De Quadros, the official liquidators of the New Fleming Company,

Messrs. Chalk and Walker, on behalf of Purmanundass, gave them notice that he claimed from the company a sum of Rs. 1,00,500 and interest thereon at 9 per cent. per annum from the 11th November, 1878, under an agreement of that day, and signed by Nursey Kessowji, the secretary, treasurer, and agent of the company; that their client held, as further security for this advance, 335 and 50 shares in the company, and also the personal guarantee of Mr. Kessowji Naik for the said sum.

In pursuance of a notice from the official liquidators, advertised in the newspapers calling upon persons claiming to be creditors of the company to send in their claims, Purmanundass made an affidavit in proof of his claim which was affirmed on the 23rd, and filed on the 24th April, 1880.

In Nursey Kessowji's schedule, filed in the Insolvent Court on the 6th February, 1879, the name of Purmanundass did not appear as a creditor, but he was entered as a debtor for Rs. 800 in respect of the promissory note above referred to.

The schedule showed that the debts of Nursey Kessowji and Company amounted to the enormous sum of Rs. 1,96,62,514-4. Purmanundass took proceedings in the High Court against Kessowji Naik on his guarantee, but without success.

On the 29th March, 1879, he filed his plaint in Suit 258 of 1879. Kessowji Naik during his inspection of Purmanundass' books discovered the agreement extending the time of the loan to six months, and put in a supplemental written statement in which he contended that the suit was premature. Purmanundass on the 17th June, 1879, obtained leave to withdraw his suit on payment of costs, with liberty to bring a fresh one on or before the 24th June then instant.

On the 18th June, 1879, he accordingly filed another suit (No. 385 of 1879) against Kessowji, which was heard by Sir Charles Sargent on six days in June, 1880; and on the 8th July, 1880, he passed a decree in favor of the defendant, with costs, holding that the agreement for the advance of Rs. 1,00,500 by way of loan made between Purmanundass and Nursey had been varied after the execution, by Kessowji Naik, of the guarantee, the subject of the suit, and that Kessowji was not aware of, and did not assent to, such variation.

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Purmanundass appealed against that decision; but the decree of Sir Charles Sargent was confirmed, and the appeal dismissed with costs.

The official liquidators by the affidavit of one of them, Mr. De Quadros, sworn on the 10th and filed in this matter on the 11th January, 1881, denied that Purmanundass had any claim in respect of his loan of Rs. 1,00,500 against the New Fleming Company, and alleged (para. 2) that the contract for the loan was made with, and the loan was made to, Nursey Kessowji in his personal and individual capacity, and not as secretary, treasurer, and agent of, or for, or on behalf of the company; and (para. 8) even if the Court should be of opinion that the New Fleming Company must be considered to be the principal on whose behalf the loan was raised, the official liquidators submitted that on the evidence of Purmanundass given and recorded in his Suit 385 of 1879 against Kessowji Naik, it was apparent that before the making of the said loan he knew or was informed that it was required for the said company, and that he nevertheless elected to give credit to and to treat Nursey as the principal, and as the only person, save Kessowji Naik as such guarantor as aforesaid, liable to him in respect of the said loan, and that he sought to charge the company only after he found it impossible to recover the said loan from Nursey and Kessowji. The official liquidators craved leave to refer to the proceedings of record in the said suit, and especially to the evidence therein of Purmanundass, of John Gordon, and Premchund Roychund.

It appears that Purmanundass made no claim against Nursey or his estate, and that Nursey did not in his schedule insert him as a creditor; also that Purmanundass made his claim against the New Fleming Company, which he formally did by his letter dated the 4th February, 1879, to the official liquidators, written within less than three weeks of the date of the order to wind-up the company (dated 17th January, 1879,) and nearly two months before he took proceedings against Kessowji Naik on his guarantee, the plaint in his first suit against that person not being filed until the 29th March, 1879. At the hearing of the matter of this claim before me, which occupied seven days from the 19th July to the 4th August 1881, the learned Advocate General, who

appeared for the official liquidators, took many points in addition to those raised in the affidavit of Mr. De Quadros, and the case was argued with great ability by him on behalf of the New Fleming Company and by Mr. Lang on behalf of Purmanundass. The evidence of Purmanundass and of Mr. John Gordon and of Premchund Roychund, who had negotiated the loan, was taken orally before me, and their evidence, given before Sir Charles Sargent, was also put in. The accounts of the respective books of Purmanundass, of Nursey Kessowji and Company, and of the New Fleming Company are annexed to the affidavit of Mr. De Quadros, and were relied on very strongly by the Advocate General. The Court, therefore, has all the materials necessary to enable it to arrive at a correct opinion upon the matters at issue between the parties.

It was contended on behalf of the official liquidators that the loan was to Nursey : that Purmanundass gave credit to him and to Kessowji's guarantee, and never looked to the New Fleming Company : that Purmanundass elected to give credit to the agent and not to the New Fleming Company, knowing that the latter was the principal and that he was not entitled afterwards to turn round and charge the principal on the default of the agent that, rightly or wrongly, Nursey treated the 335 shares as his own, and that the proceeds of the loan went into the coffers of his firm. It was further contended that the New Fleming Company had no power at all to mortgage the unallotted shares of the company, of which 335 shares formed part, and that such unallotted shares were not the "property" of the company : that a resolution of the Board of Directors, dated 31st October, 1878, to the effect that the unallotted shares (of which there were 787) be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who was empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the purpose of the company, was absolutely *ultra vires*, and that the directors could not, so as to bind the company, raise money on the shares : that Purmanundass was bound to take notice of the Memorandum and Articles of Association, and to know that the directors had no power to pledge or borrow on that security : that the directors, who were trustees and agents

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for the company, could not hold out Nursey Kessowji as authorized to raise money for, or pledge the credit of, the company, and that the claim should be dismissed with costs.

I will first consider the power which the directors had, and the authority which they conferred or professed to confer upon their agent; next the circumstance under which the loan was made by Purmanundass; and, lastly, whether or not he ought, in my opinion, to succeed in his present claim against the company.

The modern doctrine of *ultra vires*, in relation to contracts made by directors of companies incorporated under the English Companies Acts, is no where more clearly stated than in the judgment of Lord Chancellor Cairns in the House of Lords, in the important case (decided in 1875) of the *Ashbury Railway Carriage and Iron Company (Limited) v. Rich* (1). The contract there for breach of which Mr. Rich sued the company, and which in substance was an engagement to supply the contractors for the construction of a railway in Belgium with the funds necessary to enable them to execute their contract, had occasioned great difference of views in the Court of Exchequer, where two of the Judges were for the plaintiff and one for the defendants; and afterwards in the Exchequer Chambers in which Court the six Judges were equally divided in opinion. The five Law Lords in the House of Lords, however, were unanimously of opinion, that the contract, being of a nature not included in the Memorandum of Association, was *ultra vires* not only of the directors, but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. Lord Cairns after pointing out the marked difference between the two documents which, he said, from the title-deeds of companies of that description, *i. e.*, the Memorandum of Association on the one hand and the Articles of Association on the other, said (p. 667): "With regard to the Memorandum of Association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of powers of a company to be established under the

(1) L. R. 7 H. L. 653.

Act. With regard to the Articles of Association, those Articles play a part subsidiary to the Memorandum of Association. They accept the Memorandum of Association as the charter of incorporation of the company, and so accepting it, the Articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the Memorandum of Association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise, whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the Articles of Association, if you find anything which, still keeping within the Memorandum of Association, is a violation of the Articles of Association or in excess of them, the question will arise, whether that is anything more than an act *ultra vires* the directors, but *intra vires* the company."

By the Memorandum of Association of the New Fleming Company it is provided (clause vi) "that Nursey Kessowji, Esquire, shall be the secretary, treasurer, and agent of the company at the remuneration, upon the terms, and subject to the conditions and provisions contained in the agreement set forth in the Schedule annexed to the accompanying Articles of Association." And by clause vi, "the nominal capital of the company is Rs. 22,50,000, divided into 3,757 shares of Rs. 500 each and 1,486 shares of Rs. 250 each, which capital may be increased."

By clause 6 of the Articles of Association, "the allotment of so many of the shares in the original capital as shall not be required for the purpose of paying for the property business and good-will of the Fleming Spinning and Weaving Company, Limited, as mentioned in the Memorandum of Association and in clause 102 of the Articles, and as have not been allotted at the date of the registration of the Articles, shall exclusively appertain to, and be vested in the directors, who shall have the power, at their absolute discretion, to allot all or any of such shares as fully or in part paid up at a discount or otherwise in

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such manner and to such person or persons as they, in their absolute discretion, shall think fit." By clause xvi of the agreement set forth in Schedule A annexed to the Memorandum of Association, and referred to in the above cited clause iv of that Memorandum, Nursey Kessowji was to *deposit with such bank or bankers, as the directors should appoint, all money due from him to the company and exceeding in amount at any one time the sum of Rs. 5,000.*

By clause 116 of the Articles of Association, Nursey Kessowji was appointed secretary, treasurer, and agent of the company for the period of twenty-five years at the remuneration, on the terms and subject to the conditions specified in the agreement set forth in Schedule A annexed to the Memorandum of Association, and by clause 117 he was declared to have, during the said period of twenty-five years, full power and authority *to enter into such contracts and agreements as he may think proper for the purposes of the company, and to appoint and employ in, and for the purposes of the transaction and management of the affairs and business of the company or otherwise for the purposes thereof; and from time to time to remove or suspend such managers, bankers, solicitors, engineers, clerks, brokers and other officers as he shall think proper, with such powers and duties and upon such terms as to duration of office, remuneration or otherwise as he shall think fit.*

By clause 102 of the Articles of Association among other powers and authorities expressly given to, and conferred upon, the board of directors, and the secretary, treasurer, and agent, were the following:—

“(c.) *To raise or borrow from time to time in the name or otherwise on behalf of the company such sums of money as they from time to time think expedient either by way of sale or mortgage of the whole or any part of the property of the company or by bonds, debentures, or promissory notes, or in such other manner as they deem best; and for the purpose of securing the repayment of any money so borrowed with interest to make and carry into effect any arrangement which they may deem expedient by conveying or assigning any property of the company to trustees or otherwise.*”

From the minutes of a meeting of the directors held on the 6th August, 1878, it appears that the agent, *i. e.*, Nursey Kessowji, informed the Board that the company was registered on the 31st July, 1878, and it was noted (*inter alia*) that Messrs. Nursey Kessowji and Company be the bankers of the company, that interest payable by them on cash balance due by them to the company be 8 annas per cent. per annum, and that interest payable to them on cash balance by the company be annas 12 per cent. per mensem.

This appointment in August, 1878, of Nursey Kessowji and Company as bankers of the company—Nursey Kessowji and Company being a trading firm carrying on very large and hazardous speculations as was shown by their schedule filed in the Insolvent Court on the 8th February, 1879, and not a firm of bankers in the ordinary sense of the word—seems to have been a very questionable act on the part of the directors, and looks much like a violation of clause xvi of the agreement set forth in Schedule A accompanying the Memorandum of Association, and which agreement so incorporated in the memorandum formed a part of it, and a part of what, according to Lord Cairns, was the charter of the company; for, by clause xvi of that agreement, Nursey is to deposit with such bank or bankers, as the directors should appoint, all money due from him to the company exceeding in amount at any one time the sum of Rs. 5,000; clearly contemplating some other bank or bankers, and not the firm in which Nursey himself was the senior and only moneyed partner. Clause 117 of the Articles of Association, giving power to Nursey Kessowji to appoint bankers of the company, would not, I think, authorize the appointment of his own firm to act as bankers. The consequences which resulted from this appointment were most disastrous to the company; as, from the minutes of a meeting of the directors held on the 6th January, 1879, it is recorded that, from the trial balance-sheet of the affairs of the company made up to 28th December, 1878, it appeared that Messrs. Nursey Kessowji and Company were indebted to the company in the sum of Rs. 11,65,333.

From the minutes of a meeting of the directors held on the 9th January, 1879, it appears that a letter dated the 8th January,

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1879, from Nursey Kessowji was read, intimating to the directors that as he was unable to meet his engagements, and was being pressed by his creditors, he felt he had no alternative left but to file his petition in the Insolvent Debtors' Court, which he said he intended to do that day.

The minutes of meetings of the directors held on the 6th and 24th August, 25th September, 17th October, 2nd November, 29th November and 12th December, 1878, show that the powers of borrowing were largely exercised by the directors,—the agent reporting to the Board at such meetings what loans had been taken or renewed, and what had been paid.

I now come to the power expressly given by the directors to their secretary and agent to raise the money in question. At a meeting of the directors held on the 11th October, 1878, the agent informed the Board that there were 787½ unallotted shares of Rs. 500 each, which appertained to, and were vested in, the directors with power at their absolute discretion to allot. (That the directors had such power appears by clause 6 of the Articles of Association already noticed.) The Board resolved that the agent be desired to insert advertisements in the local papers asking application for the purchase of the unallotted shares (787½) of the company.

At a meeting of the directors held on the 31st October, 1878, the agent informed the Board that the unallotted shares could not be sold in the market at a fair rate. The Board then passed the following resolution:—

“*Resolved*—That the unallotted shares be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest, to enable him to obtain funds for the use of the company. The number of certificates of shares with the names of the mortgagees to be recorded at the first meeting of the Board held after such transaction is done.”

The argument that these unallotted shares were not a part of the property of the company, which the company, having regard to clause 3, sub-clause (c) of the Memorandum, and clause 102, sub-clause (c) of the Articles of Association, could validly mort-

gagé, appears to me to be quite unreasonable ; and if any authority on this point were required, it is to be found in the case of *The York and North Midland Railway Company v. Hudson*(1) —a decision which declares the position and duties of directors in regard to shares placed by the company at their disposal in a very clear and unambiguous manner.

In that case a general meeting of the York and North Midland Railway Company placed 12,058 shares in a projected extension line “at the disposal of the directors”. The Master of the Rolls, Sir John Romilly, in his judgment said (p. 491) : “The directors are persons selected to manage the affairs of the company for the benefit of the shareholders ; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders, therefore, that shares or any other species of property shall be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees ; in other words, that the persons entrusted with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust* ;” and he held that Hudson, who was the chairman, and exercised uncontrolled authority in the conduct of the concerns of the company, having sold a considerable part of such shares at a premium, was liable to account to the company for their produce with interest at £ 5 per cent.

Hudson having also, whilst chairman of the company, allotted a number of the unappropriated shares to his nominees, which were sold at a premium and of which the produce was received by him, was held, as trustee, bound to the company for the profit made. He also, whilst chairman of the company, appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which, it was insinuated, was in the nature of “secret service money”.

The Master of the Rolls held, that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences, and that, being charged

(1) 16 Bea. 435.

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with the receipt of the money, he could not discharge himself by the suggestion of such an application, and he directed an account accordingly.

Having regard to the powers especially given by clause 102, sub-clause (c), of the Articles of Association to the Board and the secretary, treasurer, and agent, to raise or borrow from time to time in the manner or otherwise on behalf of the company, such sums of money as they from time to time think expedient by bonds, debentures or promissory notes *or in such other manner as they deem best*, I entertain no doubt that the Board of Directors had power to authorize their agent to raise money for the company, and upon the security of the unallotted shares.

No doubt clause 103 of the Articles of Association states that a receipt signed by any two directors, or by any person authorized by a resolution of the directors to give a receipt for any moneys lent to the company, shall be an effectual discharge on behalf of the company for the moneys in such receipt acknowledged to be received, and the person paying any such money shall not be bound to see to the application, or be answerable for any misapplication thereof. No such resolution has, in terms, been produced authorizing Nursey to give such receipt.

I think, however, there is ground for holding that Nursey, by implication, had such authority. The resolution of the Board of Directors of the 31st October, 1878, states that the number of certificates of shares with the names of the mortgagées is to be recorded at the first meeting of the Board held "after such transaction is done". The transaction is not to be reported while it is in progress, but after it is "done". The transaction would, of course, not be "done"—*i. e.*, not completed—until the money was paid, and the money would not be paid until the shares were handed over to the lender. Agents often make contracts without disclosing the names of their principals. A person might lend money to Nursey on the security of these shares, knowing that Nursey was borrowing on behalf of some principal, but without knowing precisely who that principal was. The directors here sent Nursey into the market to raise money for the company on the security of the unallotted shares, which stood, all of them, in Nursey's name.

Assuming—what, however, is not very probable—that the lender had read the Articles of Association, he might have seen that, by clause 117, Nursey Kessowji had during twenty-five years full power and authority to enter into such contracts and agreements as he may think proper for the purposes of the company.

By section 188 of the Contract Act (IX of 1872) an agent having an authority to do an act, has authority to do every lawful thing which is necessary to do such act. A person lending money to Nursey on the security of these shares might, under certain circumstances, be justified in taking Nursey's receipt alone. He certainly would, if Nursey did not disclose who this principal was. Then, if, as the learned Advocate General contended, the directors had no power to borrow on the unallotted shares, the money lent would, nevertheless, be still money lent, although the security might be valueless. And all that the lender would have to do, would be to return them. On the first branch of the case, therefore, I am of opinion, that the directors had ample power under the Memorandum and Articles of Association, and that they authorized the secretary, treasurer, and agent to borrow money for the purposes of the company, and with that object they entrusted him, as they lawfully might, with the unallotted shares then worth about Rs. 400 each, to raise money in the market by mortgage of such shares.

I will next consider the circumstances under which the loan of Rs. 1,00,500 was made by Purmanundass to Nursey on the 11th November, 1878, and the liability (if any) of the New Fleming Company in relation thereto. Negotiation for a loan from Purmanundass had been going on for about a month before the 11th November, 1868, between Purmanundass and Mr. Gordon, Secretary of the Chamber of Commerce, and Premchund Roychund, acting on behalf of Nursey.

Premchund in his evidence before me stated that in October, 1878, Nursey asked him to get him money from any place, saying that he wanted money for the mills. He wanted two lakhs. Premchund suggested the name of Purmanundass as a likely person, and that Mr. Gordon, who was intimate with Purmanundass, should be asked to speak to him.

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Mr. Gordon stated in his evidence before me that in October, 1878, just after the failure of W. Nicol & Co., Nursey came to him and asked him to obtain for him a loan from Purmanundass. Mr. Gordon's evidence on this point is extremely important, and I will give it in his own words:—

I asked him what he wanted the money for. He said he was hard pressed by the mill-creditors, and the money was wanted to pay off the mill-deposits.

The mill had received money on deposit like banks for fixed periods of time at fixed rates of interest.

He said he wanted a lakh and a half, and would give 500 shares in Fleming Mill Company or the Nursey Mills. Nursey was secretary, treasurer, and agent of the Fleming and the three other mills.

He used to manage all four mills.

I communicated Nursey's request to Purmanundass. I told him what Nursey wanted the money for, and the security offered.

He ultimately agreed to advance one lakh and Rs. 500; that must have been about three or four weeks after Nursey's application to me.

There was some haggling about the rate of interest, and about the amount to be advanced on each share.

Purmanundass refused to abate his terms for some time.

A day or two before the loan was made, Nursey came again to me and asked me to get Purmanundass to lend the money.

I saw Nursey on Sunday, the 10th November; I saw Purmanundass on Sunday at Nursey's request.

I went to Kessowji's bungalow on Sunday, after seeing Purmanundass; Nursey was at Kessowji's bungalow.

On the Monday I saw Purmanundass again, and communicated what had taken place at Kessowji's bungalow.

On the Sunday and the Monday the interest and the amount were arranged and the number of shares to be given.

I understood from Nursey that he wanted the money for the companies, and not for his own purposes.

I told Purmanundass distinctly that the money was wanted for the mills."

In cross-examination by the Advocate General, Mr. Gordon said:—

The understanding in my mind was that he wanted the money for the four mills or for some of them.

The expression I think he used was that he was pressed by the mill-creditors.

I talked to Nursey in English which he spoke very fluently,—exceptionally so.

Purmanundass wanted 15 per cent. per annum interest. Nursey objected to pay that, because, he said, it would hurt his credit in the bazar.

I told Purmanundass that the money was wanted for the mills generally.

In the first interview which I had with Nursey I asked him if a lakh and a half would satisfy his creditors. The mill-creditors alone he said were pressing him. He said it would.

In re-examination Mr. Gordon gave this very important answer.

Nursey did not tell me which mill in particular he wanted the money for.

Premchund's evidence was to a similar effect. He said—

Nursey told me he wanted money for the mills. I went with Mr. Gordon to see Purmanundass. I told him for what purpose the money was wanted. I saw him on other occasions without Mr. Gordon.

I told him Nursey wanted the money for the mills.

I did not tell him which of the four mills the money was wanted for.

I knew that the 335 shares formed a part of the unallotted shares of the Fleming Company.

Nursey told me the directors had authorized him to borrow money on those shares.

I do not recollect whether I told Purmanundass that.

I understood that the loan was being made to the Fleming Company.

In cross-examination he said:—

“Nursey told me the money was wanted for the mills.

“He did not say he wanted the money for any particular mill.”

In answer to a leading question put him by the learned Advocate General, he said:—

“Nursey is the person to whom Purmanundass gave credit coupled with Kessowji's guarantee.”

He explained that on re-examination thus—“Purmanundass advanced the money to Nursey with Kessowji's guarantee on the shares.

“That is what I mean by saying he gave credit to Nursey.”

Premchund, whose knowledge of financial matters in Bombay was, and is, probably unrivalled, said that the mill companies (*i. e.*, the four of which Nursey was the secretary, treasurer, and agent) were all hard up, and that Nursey Kessowji and Company's creditors and the mill creditors were both pressing about the 11th November.

Both Mr. Gordon and Premchund appeared to me to give their evidence with most perfect candour and fairness, and I feel that I can rely upon it with safety.

Purmanundass in his evidence corroborates the principal portions of Mr. Gordon's and Premchund's evidence. I am, however, quite unable to accept as correct his statement that Mr. Gordon told him the money was required for the New Fleming Company. Mr. Gordon says distinctly that Nursey did not tell him which

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mill in particular he wanted the money for, and that he (Mr. Gordon) told Purmanundass that the money was wanted for the mills generally.

It is most improbable that Mr. Gordon would have told Purmanundass a fact of which he himself was quite ignorant.

The Advocate General, too, strongly contended on behalf of the official liquidators that it was not pretended that the money was wanted for any particular mill, and that Nursey borrowed the money for the mills, used the money for his firm, and appeared to treat the mills as his own property.

Several questions were put to Purmanundass in cross-examination with a view, if possible, of getting from him an admission that he considered Nursey as his debtor for the amount advanced; but his answers were, in substance, uniform and, in my opinion, correct, viz., that he lent the money on the shares, that he was to look for payment out of the proceeds of the 335 shares (then worth Rs. 400 each), and if there was any balance, he was to be recouped out of the guarantee of Kessowji Naik.

I consider it to be clearly proved that Purmanundass lent his money and paid it to Nursey, who, he was led to believe by Mr. Gordon and Premchund, was raising the loan on behalf of the four mill companies, of each of which Nursey was, and was known by Purmanundass to be secretary, treasurer, and agent, but that neither during the progress of the three or four weeks' negotiations, nor when the loan was finally arranged and the money paid on the 11th November, 1878, was Purmanundass aware or informed for which of the four mill companies the loan was obtained; in other words, that the money was advanced to Nursey and the documents signed by him and by Kessowji on the 11th November, he, the said Nursey, then acting on behalf of an undisclosed principal.

Sir Charles Sargent upon the evidence before him in Suit No. 335 of 1879, the second suit brought by Purmanundass against Kessowji Naik, arrived at a similar conclusion, as will be seen from the following passage in his judgment—

“It does not appear, upon the evidence, that the plaintiff was given to understand when the loan was negotiated that it was

required for any particular mill. He seems to have been told simply, as he described it in cross-examination, that Nursey wanted money. In re-examination, he says, he was told that it was wanted for the Fleming Spinning Company. This is not consistent with either Mr. Gordon's or Premchund's evidence—the latter of whom particularly says that Nursey did not say on whose account he wanted it. However this may be, in December, 1878, plaintiff, no doubt, had reason to think that it had been borrowed for, and on behalf of, the company; and the question arises, whether the plaintiff has so elected to treat the company, the undisclosed principal, as his debtor as to have discharged Nursey, in which case it would follow that the defendant would himself be discharged from his guarantee."

Nursey having, therefore, obtained the loan while acting on behalf of an undisclosed principal (the New Fleming Company), what were or are the liabilities of the latter, first upon the English authorities, and, secondly, under the Indian Contract Act, No. IX of 1872, which is mainly based upon English law and English decisions.

Thompson v. Davenport (1), decided by the Court of King's Bench in 1829, is a leading authority upon this point. There, at the time of making a contract of sale at Liverpool, the party buying the goods represented that he was buying them on account of persons resident in Dumfries, but did not mention their names, and the seller did not enquire who they were; but afterwards debited the agent who purchased the goods. It was held that the seller might afterwards sue the principals for the price.

The Judgment of Lord Tenterden, C. J., is constantly acted upon in the Courts of England at the present day. I will quote from that portion of it which is most applicable to the facts now under consideration:—

"On the other hand if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone, then, accord-

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ing to the cases of *Addison v. Gandesqui* and *Paterson v. Gandesqui*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal *having once made his election at the time when he had the power of choosing between the one and the other*.....The plaintiffs were informed that M^r Kune, who came to them to buy the goods, was dealing for another; that is, that he was an agent, but they were not informed who the principal was. They had not, therefore, at the time the means of making their election.....*Not knowing who the principal really was, they had not the power at that instant of making their election.*"

Mr. Justice Bayley in the course of his judgment in the same case said:—

"But there are cases which establish this position; that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal and to say that he will look to the agent alone, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, *provided he did not know who he was at the time when the purchase was originally made.*"

The case of *Calder v. Dobell*(1), decided in January, 1871, is an extremely important one.

There, Cherry, a broker at Liverpool, was authorized by the defendant, a merchant there, to buy cotton for him, but not to disclose his name. Cherry's credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiff the name of his principal, and bought and sold; notes were exchanged between the plaintiff and Cherry in which the latter was named as the buyer. Cherry sent the defendant an advice note informing him that he had bought the cotton of the plaintiffs "for him", and the defendant did not repudiate the transaction. An invoice was made out to Cherry, and the

(1) L. R. 6 C. P. 486.

market falling, Cherry was called upon by the plaintiffs to accept and pay for the cotton, and was threatened with legal proceedings. Failing to obtain payment from Cherry, the plaintiff sued the defendant.

At the trial before Mr. Justice (now Lord Justice) Brett at the Liverpool Assizes he left three questions to the jury, of which the first was: "Did the defendant authorize Cherry to make the contract for him"; and the third was "Did the plaintiffs, knowing that Cherry was acting as agent for the defendant, elect to contract with Cherry, as principal, upon the terms of giving credit to him and to him alone." This third question, Brett, J., said, when the case afterwards came before the full Court, he left to the jury, having *Thompson v. Davenport* before them.

The Court consisting of Bovill, C.J., Willes, Montague Smith, and Brett, J.J.—a very strong one, as each of those Judges had had great experience in commercial cases—held that the fact that the defendant's name was disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstance under which the contract was made was admissible; that the insertion of Cherry's name in the contract, though his principal was known at the time, and the subsequent demands upon Cherry for payment, did not necessarily amount to an election on the part of the plaintiff to give credit to Cherry, and to him alone. The rule to set aside the verdict for the plaintiff was refused.

Bovill, C.J. said (p. 489): "It has for many years been a generally received impression that when a broker makes a contract for an undisclosed principal, the latter may sue upon it, and equally, that when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have sued upon the contract so made by Cherry: and I am equally of opinion that he may be made responsible, provided that parol evidence was admissible to show that he was the real principal. . . . The suppression of the principal's name is entirely consistent with the practice of many trades to conceal transaction of speculation. The effect is that if the broker enters into contracts in his own name, and has a principal, those whom he contracts with, will have the responsibility both of the principal

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and of the brokers. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible.”

Mr. Justice Willes said (p. 494): “I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is, whether there was anything in the circumstances of this case to negative or conclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former....There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantages of knowing the principal’s name at the time....To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense.”

Of Mr. Justice Montague Smith’s judgment I will only quote this passage (p. 497):—

“The cases show that the seller may make his election whenever the principal is discovered; and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that, in the former case, the election may be made at the very time the contract is made.”

An appeal was brought against the above judgment, and was decided in the Exchequer Chamber in June, 1871, by Kelly, C.B., and six other Judges, without calling upon the counsel for the plaintiff.

Kelly, C.B. said (p. 499): “I think the case is free from doubt or difficulty: the contract was made in the name of Cherry, the agent; but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiff had a right to sue either the agent or the principal at their election. No doubt the election being once determined, there is an end of the matter as when the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time; this action was brought against the principal.”

Martin, B., said that the fact of his name having been mentioned at the time, did not make the defendant the less a prin-

cipal. Blackburn, J., said he apprehended that, where a man is acting as agent, the principal is not the less bound because the contract is so drawn as to make the agent also liable.

Hannen, J., referred to Story on Agency where it is said: "If the agent possesses due authority to make a written contract not under seal and he makes it in his own name, whether he describes himself to be an agent or not, or *whether the principal be known or unknown*, the agent will be liable to be sued and be entitled to sue thereon; and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." The rest of the Court concurred, and the judgment was affirmed.

In *Fleet v. Murton*(1)—(decided in November 1871) where one of the questions was as to the admissibility in evidence of a custom in the London print trade to make brokers, who do not name their principal in the contract note itself, personally liable on the contract—Mr. Justice Blackburn in the course of his judgment said (p. 131):—

"Then I take it that there is no doubt at all that the rule of law laid down in the case of *Higgins v. Senior* (8 M. & W. 834) and the other cases there cited, is perfectly correct; namely, that when the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he addresses himself to be the contracting party, he thereby says, 'I am to be liable.' And though he has done this, yet his principal also is liable; because the agent who has made the contract does bind his principal, though he has chosen to bind himself also; and it is no answer (as was held in the recent case in the Common Pleas of *Calder v. Dobell*(2) which was affirmed in the Exchequer Chamber) to say on the part of the principal: 'The contract was made by my agent, and my agent is responsible.' That the agent is liable, is no answer, and no reason why the principal should not be responsible."

(1) L. R. 7 Q. B. 126.

(2) L. R. 6 C. P. 486.

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The various cases, of which *Armstrong v. Stokes*(1) (decided in July 1872) is a recent one, to the effect that a vendor who has given credit to an agent believing him to be the principal, cannot recover against the undisclosed principal, if the principal has *bona fide* paid the agent at a time when the vendor still gave credit to the agent and knew of none else as principal, are inapplicable to the present one.

In the considered judgment of the Court in *Armstrong v. Stokes* delivered by Blackburn, J., it is said (p. 607): "As is laid down in *Higgins v. Senior* (8 M. & W., p. 844), it is always competent, notwithstanding this form of agreement, to show who the person was for whom the broker acted as agent in making the contract 'so as to give the benefit of the contract on the one hand to, and to charge with liability on the other, the unnamed principals.' In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal."

In *Heald v. Kenworthy*(2), Parke, B.—in commenting on the *dictum* of Bayley, J., in *Thompson v. Davenport*, to the effect that if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, such a state of accounts would be an answer to an action brought by the seller where he had looked to the responsibility of the agent—said (p. 746): "The expression 'make it unjust' is very vague; but, if rightly understood, what the learned Judge said is no doubt true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, or the faith that the agent and seller have come to a settlement on the matter, or if any repre-

(1) L. R. 7 Q. B. 598.

(2) 10 Ex. 739.

sentation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant, or to induce him to alter his position."

I have quoted from the two earliest of the above cases at some length, as the law laid down in *Thompson v. Davenport* and in *Calder v. Dobell* appears to have formed the groundwork of sections 230, 233 and 234 of the Indian Contract Act (the sections most applicable to the present case), which Act received the Governor-General's assent on the 25th April, 1872, long before which time the report of the decision of the Court of Common Pleas in January and of the Exchequer Chamber in June, 1871, in the latter case must have reached Mr. FitzJames Stephen, who is supposed to have framed, and who carried the Indian Contract Act, 1872, through the Legislative Council.

What are the liabilities of an undisclosed principal under the Indian Contract Act, the provisions of which, so far as they extend to the present case, must, no doubt, be held applicable?

The material sections are the three just referred to, viz., sections 230, 233 and 234. (His Lordship read the sections.)

Mr. Pollock in his *Principles of Contract* (p. 237, 2nd ed., 1878) says that section 230 of the Indian Contract Act, which he quotes, is based upon English law; but it does not exactly represent it, as it omits to provide any fixed rule for the treatment of contracts made by an agent in writing.

Sub-clause 2 of that section makes an agent personally liable who does not disclose the name of his principal. In the present case Nursey made himself personally liable by his written agreement of the 11th November, 1878; and his liability on that agreement has never been disputed. Sub-clause 2 is inapplicable here, as there is no necessity, and, indeed, it would be incorrect to presume a contract on Nursey's part when he has made an express contract on which he is liable.

Sub-clause 3 of that section appears to me not to apply here, as the principal, the New Fleming Company, was not disclosed at

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the time of the contract ; and as such principal, when subsequently disclosed, could and can be sued.

Section 233 is the one most applicable to the present case as here the agent Nursey is, or rather was until he filed his schedule in the Insolvent Court, personally liable on his contract with Purmanundass, and, therefore, Purmanundass, the person dealing with him, may hold either him or his principal, the New Fleming Company, or both of them, liable. The illustration to that section distinctly applies to the present case.

The latter portion of section 234 is evidently based on the law laid down by Lord Tenterden, C.J., in *Thompson v. Davenport*(1) already cited by me. That section provides that when a person who has made a contract with an agent . . . induces the principal to act upon the belief, that the agent only will be held liable, he cannot afterwards hold liable the principal.

I consider that section to be wholly inapplicable here, as Purmanundass previously to, and at the time of, lending his money to Nursey did not know for what principal Nursey was acting, and did not ask, and was not in any manner bound to ask, who that principal was ; and, according to the evidence, he never then or at any subsequent period induced the directors of the New Fleming Company to act upon the belief that Nursey only would be held liable. The loan, too, was for six months, and would not be repayable until May, 1879. Purmanundass has never taken any steps against Nursey, who became insolvent in December, 1878, and, as already stated, filed his petition in the Insolvent Court on the 10th January, 1879 ; on the contrary, he, at once, as soon as he had reason to suspect that his money was in danger, and when he knew that the New Fleming Company were the real principals, by his solicitors' letters of the 30th December, 1878, 11th January, 1879, and 4th February, 1879, did all in his power to assert his claim against the company—a claim which he has never abandoned up to the present moment.

In his affidavit (in reply to Mr. De Quadros's affidavit) affirmed on the 6th April, 1881, and filed on the 15th July, 1881, Purmanundass says :—

(1) 9 B. & C. 78.

“ It was never my intention to waive my claim against the said company, but, on the contrary, I also intended to make my claim against it, and for such purpose in January, 1879, actually employed counsel, Mr. Macpherson, to draw a plaint for me in respect of my said claim, in which plaint the said company was made one of the defendants.”

That statement was not contradicted or sought to be impeached in any manner by the official liquidators.

The official liquidators of the New Fleming Company in resisting Purmanundass' claim derived no assistance, that I can see, from any of the provisions of the Indian Contract Act.

Then, how do the facts stand as to election—

In *Curtis v. Williams*(1) it was held that the mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor.

In delivering the considered judgment of the Court, Mr. Justice Quain said (p. 60.) :—

“ Whether, in regard to proceedings taken against the agent by action at law, anything short of judgment and satisfaction would be sufficient to exclude resort to the principal, was the point raised in the case of *Priestly v. Fernie*(2).”...The Court there held that where an agent has made a contract in his own name, has been sued on it to judgment, even without satisfaction, no second action would be maintainable against the principal; but it is clear from the language used by Bramwell, B., in delivering the judgment of the Court, that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word “ sue” he means “ sue to judgment”.

Here no action was ever commenced against the agent, and every effort was made to intercept and withhold the affidavit in

(1) L. R. 10 Q. B. 57.

(2) 3 H. & C. 977.

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bankruptcy which had been made, as it would seem without due consideration and without any intention whatever to discharge the present defendants from responsibility. We think it would be going much too far to hold that this was, in point of law, a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals.

It will be recollected that in the judgment of Kelly, C.B., in *Calder v. Dobell*(1) in the Exchequer Chamber, he said: "I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end of the matter, as where the agent has been sued to judgment."

In the present case, Purmanundass, directly he knew who the principals really were, elected to proceed against them, and in no way and at no time can be said to have elected to proceed against Nursey Kessowji.

An election once validly made is final, and cannot be opened or altered and a fresh election made.

In *Smethurst v. Mitchell*(2)—where the price of the goods being due in October, 1857, the plaintiff in November was informed that the defendant was the principal, but took no proceedings against him until September, 1858, and had by his conduct in lying by for those months induced the defendant to alter his position in regard to his agent to his prejudice, and was, therefore, held not entitled to recover the price of the goods from the defendant—Hill, J., said (p. 979): "All the authorities concur in settling the principle by which this case is to be decided for the defendant. A vendor cannot hold the principal liable where there is any circumstance in the case which renders it not right or equitable that he should do so; for instance, by lying by, and by his conduct inducing the defendant to change his position. That is a true and correct principle, and this case falls directly within it. Here the plaintiff has by his conduct induced the defendant to alter his position, and having done so, he cannot now make his election and sue the defendant."

(1) L. R. 6 C. P. 499.

(2) 5 Jur. N. S. 978; S. C. 1 E. & E. 622.

Mr. Justice Crompton concurred in the remark of Hill, J., and said (p. 980.): "I am inclined to say that in a case of this kind to charge the principal, the vendor must make his election within a reasonable time after he has been disclosed to him, and the election once made cannot be altered. In this case, if I may say so, the election was the other way. When did the vendor elect to look to during the year? His conduct clearly shows that he elected to take the agent as his debtor."

Although the decision there was in favour of the defendant, the grounds on which that decision was rested, and the views expressed by those learned Judges, each of whom, when at the bar, had had very great experience in commercial cases, especially at Liverpool, are extremely applicable to the present case.

Purmanundass no doubt afterwards sued Kessowji Naik, the guarantee, but he did not sue him to judgment, *i. e.*, he did not obtain judgment against him, as the suit was dismissed with costs. No case has been cited, nor I believe does any exist, which shows that suing a person, who has guaranteed a loan, or the price of goods sold to an agent, and, moreover, suing him without success is a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals. Here the election to go against the company and to charge them as principals had been duly and finally made long before proceedings were commenced against Kessowji Naik.

The various accounts in the books of Purmanundass, of Nursey Kessowji and Company, and of the New Fleming Company, do not appear to me to stand in the way of the claimant. Dealing, as he did, with Nursey, who was acting for an undisclosed principal, Purmanundass would naturally debit Nursey in his books, and the entries would, of course, appear as if the loan had been made to Nursey, especially as Nursey, by his agreement with Purmanundass dated the 11th November, 1878, rendered himself personally liable to repay the money. Immediately he paid the money to Nursey, Purmanundass' responsibility, in my opinion, ceased, and the manner in which Nursey dealt with the money and the state of accounts between Nursey Kessowji and Company and the company of which he was the secretary, treasurer,

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and agent, were to Purmanundass matters on which, under the circumstances of this case, he had not and could not be expected to have any knowledge whatever. He had no access, and had no right to demand access to any of their books. The entries, too, in Nursey Kessowji and Company's books would appear to have been all made on or about the 11th, 12th, and 13th November, *i. e.*, immediately after the loan, or a month more before Purmanundass discovered who the principals were. Such entries were so made without his knowledge or consent, and are in no way binding on him. Except in the company's journal there is no entry of the loan in any of the company's books. Such loan was not reported by Nursey to the directors on the 29th November, 1878, as it ought to have been.

The evidence, too, appears to be almost conclusive that such journal entry was not, and, indeed, could not have been, made until on or after the 20th December, as the total amount credited to the account of the New Fleming Company, aggregating Rs. 1,52,850, included Purmanundass' loan of Rs. 1,00,500, and also a loan of Rs. 8,000 from Ardasir Hormasjee Chinoi; and that person's original loan of Rs. 10,000 was not reduced to Rs. 8,000 until the 20th December, 1878.

The accounts in Nursey Kessowji and Company's books show that his firm had paid out for the three other mills, of which Nursey was the secretary and treasurer, and for the purposes of his firm's transaction, various sums from the moneys held by the firm.

His firm's cash-book shows that on the 12th November, the day after that on which the loan was made, a sum of Rs. 33,000, apparently part of Purmanundass' loan, was paid by Nursey Kessowji and company to the New Fleming Company; but the official liquidators, in their zeal for the interests of their insolvent company, do not allow Purmanundass credit for a single pie of that by no means small sum; on the contrary they ask the Court to dismiss his entire claim with costs.

For the above reasons, I am of opinion that Purmanundass Jivandass is entitled to rank as a creditor of the company for the sum of Rs. 1,00,500, with interest thereon from the 11th

November, 1878, at 9 per cent., until the 28th December, 1878, the date of the presentation of the petition to wind-up the company, less the sum of Rs. 800, the amount of the promissory note, with interest thereon at the above rate up to the 28th December, 1878. He must return the 385 shares to the official liquidators if they desire to have that absolutely worthless paper.

Purmanundass must have his costs of, and incidental to, his claim and of the hearing thereof, and of this day, out of the estate of the company; such costs to be paid by the official liquidators in full and in priority to any claims of shareholders.

The official liquidators will have their costs, to be taxed as between attorney and client, out of the estate of the company.

All the above costs to be taxed as if this were a long cause in Court.

NOTE.—An appeal was filed by the official liquidators against the above decision, but was not proceeded with.

Attorneys for the claimant.—Messrs. *Hearn, Cleveland, and Little.*

Attorneys for the company.—Messrs. *Ardasir and Hormasjee.*

ORIGINAL CIVIL.

Before Mr. Justice West.

BAI MANECKBAI (PLAINTIFF) v. BAI MERBAI AND OTHERS
(DEFENDANTS).*

December 15.

Parsis—Statute of Frauds—Stat. 29; Charles II, c. 3—Trust—Resulting trust.

The plaintiff, who was the widow of G., sued the defendant, the executrix of J., to recover a sum of Rs. 7,394-9-6, part of the purchase-money of a house which had been sold by J. in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband G. to J. in trust to sell and hold the proceeds in trust for G's family. The defendant denied the trust, and insisted that J. had purchased the house from G. for valuable consideration. Both J. and G. were Parsis.

Held that, even assuming that no consideration was given by J. to G. for the house, the plaintiff was not entitled to succeed.

In the absence of consideration, the trust of the house, which was admittedly conveyed by G. to J., would have resulted to G., unless, under the provisions

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