

paying her weekly visits under the name of Mr. Stewart; the butler identifies the co-respondent, and the manager thinks he is the same person. Cooke has not called his sister or other person to explain his frequent visits at Poona.

On the whole the conclusion of the District Judge is supported by the evidence; and the decree as against the co-respondent must be confirmed, and he must pay the petitioner's costs in this Court.

Decree made absolute.

NOTE.—Any marriage by one of the parties, the other living, before the expiration of six months from the date of the decree or before the time for appealing has expired, is null and void. See Macrae on the Indian Divorce Act.—Notes to section 57, p. 146.

ORIGINAL CIVIL.

Before Chief Justice Farran and Mr. Justice Starling.

MOTI GULA'BCHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. MAHOMED MEHDI THA'RIA TOPAN (ORIGINAL DEFENDANT), RES-
PONDENT.*

1895.

August

Evidence—Burden of proof—Promissory notes—Proof of consideration—Suit by professional money-lender against a young man recently come of age—Presumption—Negotiable Instruments Act (XXVI of 1881), Secs. 44, 45 and 118—Evidence Act (I of 1872), Sec. 114, illustration (c).

Professional money-lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendant, who under the will of his father was entitled to a large property but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the case the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case:—

1. That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of illustration (c) to section 114 of the Evidence Act (I of 1872).

(2) Where the plaintiff, in answer to such a defence, affirmed that he had paid

* Suit No. 337 of 1894.

1895.

MOTI
GULA'BHAND
v.
MAHOMED
MEHDI
THA'RIA
TOPAN.

the consideration in full, and was corroborated by his books and witnesses, the *onus* of proof again shifted over upon the defendant.

(3) The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in section 118 of the Negotiable Instruments Act (XXVI of 1881) must prevail, *viz.*, until the contrary is proved the presumption should be made that every negotiable instrument was made for consideration,

SUIT to recover Rs. 4,500 on three promissory notes for Rs. 1,500 each executed by the defendant (respondent) to the plaintiffs on the 15th June, 1894.

The defendant admitted execution of the notes, but alleged that he had received only Rs. 1,080 in respect of them, and he submitted that the plaintiffs were, "in any event, only entitled to the said sum of Rs. 1,080, with reasonable interest thereon, such sum being the only valid consideration for the said notes."

At the hearing, issues were raised as to whether the defendant received any valid consideration for the notes except the sum of Rs. 1,080, and whether the plaintiffs were entitled to recover anything more than that amount.

The defendant was a young man, only recently come of age. The plaintiffs were professional money-lenders.

The lower Court (Fulton, J.) found the first of the above issues in the defendant's favour, and passed a decree for the plaintiffs for Rs. 1,080 with interest, and ordered the parties to pay their own costs.

The plaintiffs appealed, and contended that a decree ought to have been passed for the full amount claimed, with interest and costs.

Macpherson (Acting Advocate General) and *Kirkpatrick* for the appellants (plaintiffs).

Inverarity and *Russell* for defendant (respondent).

FARRAN, C. J. :—This was a suit in which the plaintiffs sought to recover the amount of three promissory notes for Rs. 1,500 each from the defendant. The defence was that, as to part of the consideration for the notes, the defendant did not receive it, and as to a further part that the consideration was immoral. The defendant admitted that he had received consideration to the extent of Rs. 1,080, and

brought that sum into Court, his doing so having been made a condition of his being granted leave to defend the suit. The plaintiffs allege, on the other hand, that they paid full consideration for the notes. The question between the parties is thus one of pure fact.

The law which allows the defendant to dispute the consideration for the notes is contained in sections 44 and 45 of the Negotiable Instruments Act (XXVI of 1881). It is unnecessary in this case to have recourse to the doctrine of equity, which relieves expectant heirs from unconscionable bargains. The Division Court accepted the defendant's version of the transaction as correct. From that finding the plaintiffs have appealed.

Before adverting to the facts, which it will be necessary for us to do in some detail, we desire to state how the *onus* of proof in a case like this, irrespective of the order in which the evidence is given, substantially lies. The defendant, when he executed the notes sued upon, was a young man who had only attained his majority nine months previously. He appears to have been of an extravagant and reckless character. He was entitled to a large amount of property under the will of his father, the late Sir Thária Topan of Zanzibár, but had not come into possession of it, as on account of family disputes it was, in common with the rest of the family estate, in the hands of a receiver appointed by this Court. The plaintiffs are a Márvádi firm who are by profession money-lenders.

These facts being admitted (apart from the technical rule laid down in section 118 of the Negotiable Instruments Act) the ordinary presumption that a negotiable instrument has been executed for value is so much weakened, that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full. This is, we think, the practical effect of illustration (c) to section 114 of the Evidence Act, and its explanation. Where the plaintiff in answer to such a defence affirms that he has paid the consideration in full, and is corroborated by his books and witnesses (if any), the *onus* again shifts. The strength of the case to be rebutted will depend upon the credit to be given to the testimony adduced by the plaintiff as tested by cross-examination, the weight to be attached to his

1895.

MOTI
GULABHAND
v.
MAHOMED
MEHDI
THÁRIA
TOPAN.

1895.

MOTI
GULABCHAND;
v.
MAHOMED
MEHDI
THARIA
TOPAN.

books arising from the manner in which they are kept, and the presence or absence of suspicious circumstances in connection with them, and upon its inherent probability. When these circumstances concur in the plaintiff's favour, a heavy *onus* is thrown upon the defendant which can only be met by a perfectly truthful and harmonious statement which the Court feels able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in section 118 of the Negotiable Instruments Act must prevail: "Until the contrary is proved the presumption shall be made that every negotiable instrument was made for consideration." We do not lay down the above propositions as rules of law, but we state them as the guides which we have placed before us in examining the evidence which has been recorded. [His Lordship then examined the evidence at length, and the appellate Court varied the decree and gave judgment for the plaintiff for the amount claimed.]

Decree varied.

Attorneys for the appellant (plaintiff):—Messrs. *Nanu and Hormasji.*

Attorneys for the defendant (respondent):—Messrs. *Roughton and Byrne.*

TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

1895.

October 14.

A. M. KER, PLAINTIFF, v. A. MEAKIN AND OTHERS, DEFENDANTS.*

Probate—Will—New page of will not duly executed substituted by testator after execution of will—Dependent relative—Revocation.

After the death of the testator (H. G. Meakin) his will was found among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death" written in his handwriting on the face of the envelope. The will was wholly in his writing and was written on four separate sheets of paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator and by two witnesses. The fourth page stated the date of the will (28th November, 1892) and was signed by the testator and was duly attested by the said two witnesses. The actual execution of the will took place (as was proved by

* Suit No. 20 of 1895.