ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911.
August 22.

RAJA BAHADUR SHIVLAL MOTILAL *v.* THE TRICUMDAS MILLS COMPANY, LIMITED.*

Internal defects in management of a limited company—Innocent party not affected thereby—Principal and agent—Fraud of agent in withholding information from principal—Principal not affected by notice to agent in such case—Absolute undertaking to execute a mortgage on specified property on the happening of a particular contingency—Effect of such undertaking as giving a charge over the property on the occurrence of the contingency.

By a mortgage of the 15th April 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs. Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he appointed one Dani, his munim in Bombay, as such nominee.

In June 1907 the defendants borrowed three lacs on a cash credit opened with the Bank of India for one year from June 11th, 1907. The said transaction was made conditionally on the defendants giving an undertaking not to further charge the property previously mortgaged to the plaintiff and a resolution to that effect was passed at a meeting of the defendants' directors at which Dani was present. No letter of undertaking was in fact given.

The loan from the Bank of India was renewed at the end of the year for another year. The Bank made some attempt to obtain a higher rate of interest, but in the end the loan was renewed at the same rate as before.

In 1909 the defendants failed to pay the said loan to the Bank of India when due. Finally the said loan was renewed for three months on further security being given on June 30th, 1909.

On August 5th, 1909, the defendants applied to the plaintiff for a further advance of five lacs of which two lacs were required urgently on the security of the said property mortgaged to the plaintiff. The plaintiff consulted Dani who approved of the transaction. The plaintiff thereon advanced two lacs and received a receipt for the sum in which it was stated that the said two lacs formed part of a sum of five lacs intended to be advanced by the plaintiff, that the plaintiff should have time to consider whether he would advance the said sum of five lacs as a further charge and that in the event of the plaintiff deciding to advance such sum the defendants would execute a proper legal deed of charge to secure such sum and interest and in the event of the plaintiff deciding not to make such further advance the said sum of two lacs should be repaid immediately with interest and together with the original loan of six lacs. At the date of the said receipt there were only three directors of the defendants and not four, the minimum number under the Articles of Association of the defendants.

* Suit No. 357 of 1910.

Thereafter the plaintiff decided to make the proposed advance and signified his intention to the defendants.

A formal deed of charge was prepared but not executed owing to the insolvency of the defendants and other circumstances.

On August 10th the plaintiff for the first time received notice of the resolution of the defendants in favour of the Bank of India.

The plaintiff had the receipt passed in his favour by the defendants stamped as a charge on land and registered.

On September 17th the defendants were declared insolvent and Mr. R. D. Sethna was appointed liquidator. As such liquidator he was ordered to sell the mortgaged property and hold the sale-proceeds subject to the amount due to the plaintiff.

The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs. The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale-proceeds for two lacs and interest and for payment of that sum.

Held, that there was no properly constituted Board of Directors of the defendants at the date of the said receipt, but held that the resolution of the defendants' directors in favour of the Bank of India was exhausted after one year and was not renewed on the renewal of the loan by the Bank of India.

Held further, that Dani had withheld information from the plaintiff as to the said resolution in favour of the Bank of India fraudulently and that the plaintiff could not be imputed to have received notice of that resolution, that in any case the defendants would not be allowed to take advantage of their breach of resolution and that the plaintiff's rights were in no way prejudiced by irregularities in the internal management of the defendants, such as the absence of a Board at the date of the receipt in favour of the plaintiff, of which the plaintiff had no notice.

Held further, that the receipt given by the defendants to the plaintiff amounted to an unconditional undertaking to execute a deed of further charge in favour of the plaintiff on the happening of a future event, namely, on the plaintiff tendering the sum of three lacs, the balance of the proposed loan of five lacs, on the property specified therein, for the whole amount of five lacs, of which the two lacs already advanced was a part, and that the said receipt consequently gave the plaintiff a valid charge over the defendants' property for the two lacs advanced and interest.

By a mortgage of the 15th of April 1905 the defendants mortgaged to the plaintiff their immoveable property and machinery for six lacs. The loan was for a period of six years, and one condition was that the plaintiff or his nominee should be a director of the defendants during its continuance.

The plaintiff appointed his *munim* in Bombay, one Dani, as his nominee on the defendants' Board.

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Afterwards, while Dani was still a director of the defendants, the defendants, being in need of money, negotiated for a loan in the form of a cash credit of three lacs with the Bank of India. That Bank refused to advance that sum except on the condition that the defendants should undertake not to further charge or mortgage the mill property during the currency of the loan. Dani was a director of the Bank of India and was present at the meeting of the Bank's Board held on the 7th of June 1907, at which a resolution to that effect was passed, and Dani was also present at a meeting of the defendants' Board held on the 11th of June 1907, at which a resolution was passed authorising the giving of an undertaking to substantially that effect. The Bank accordingly advanced three lacs to the defendants for one year from the 11th of June 1907 and the defendants passed a promissory note to the Bank for that amount.

For some reason, however, no letter undertaking not to charge the defendants' property was ever given to the Bank of India.

The said loan by the Bank of India was renewed by a resolution of the Bank's Board of the 3rd of June 1908 for a further period of one year up to the 11th of June 1909. Some suggestion was made that a higher rate of interest should be charged on renewal, but the loan was eventually renewed at the same rate.

The defendants failed to pay the said loan to the Bank of India and ultimately the loan was renewed by a resolution of the Bank's Board on the 30th of June 1909 on the same terms as before for three months on condition that the Bank should be given a full legal lien on all stock of the defendants.

In the beginning of June 1909 there were six directors of the defendants, including Dani. On the 12th of July 1909 Dani resigned. Two of the other directors had previously resigned and there were thus left three directors or an insufficient number to form a Board under the defendants' Articles of Association (four being the prescribed number).

At the beginning of August 1909 the defendants by thier agents approached the plaintiff for a further loan of five lacs of which two lacs were urgently required on the security of a further charge on the defendants' property to be given to the plaintiff. The plaintiff consulted Dani about the matter and was told that there was no objection to the proposed loan.

The plaintiff thereon advanced two lacs to the defendants on the 5th of August 1909 and was given by the defendants in receipt therefor a document to the following effect :—

"Bombay, 5th August 1909. *Re* the Tricumdas Mills, Limited.

Received from Raja Bahadur Shivlal Motilal the sum of rupees two lacs for and on account of the above mills in part payment of the sum of rupees five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said mills as a further charge subject to the following arrangement, *viz.* :—that the Raja Bahadur will after inspection of the mills on or before Monday next decide whether or not he will advance the said sum of rupees five lacs as a further charge. In the event of his deciding to make such advance the company will execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at seven per cent. on the same terms and conditions as are contained in the original mortgage for rupees six lacs now subsisting in favour of the Raja Bahadur subject to the modification that in the event of such further charge being executed the original loan of rupees six lacs and the further advance of rupees five lacs shall be repayable six years after the date of the further charge and that on execution of the further charge the (sum) of rupees five thousand five hundred shall be paid by the company to the Raja Bahadur as and by way of commission. In the event of the Raja Bahadur deciding not to make the further advance the said sum of rupees two lacs together with the original loan of rupees six lacs shall be repaid immediately with interest at seven per cent. per annum on the aggregate amount until payment together with interest at three and a half per cent. per annum on the said sum of rupees six lacs for the unexpired term of the mortgage."

The said document was signed by two directors of the defendants and countersigned by the defendants' Treasurers, Secretaries and Agents Messrs. Tricumdas Dwarkadas & Co.

After making investigations the plaintiff decided to make the proposed advance to the defendants and signified his intention in a letter written by his attorneys dated the 9th of August 1909 to that effect, in which letter it was also stated that the balance of three lacs would be paid to the defendants

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on execution of the deed of further charge and on the terms and conditions mentioned in the said receipt.

A formal deed of further charge was then prepared by the plaintiff's solicitors, but before its execution events occurred which prevented the matter being proceeded with and the defendants became insolvent.

On the 10th of August 1909 the plaintiff was informed for the first time by a letter from the Manager of the Bank of India of the cash credit of the defendants with the Bank and of the undertaking given in respect of it.

The receipt given to the plaintiff was at first stamped with a one-anna stamp but afterwards the plaintiff took steps to have the document stamped and registered as a charge on land and the document was registered on the 10th of September 1909, a sufficient identification of the mill property being filled in by Dani for the purposes of registration.

On the 17th of September 1909 the defendants were adjudicated insolvent and Mr. R. D. Sethna was appointed liquidator thereof.

By an order of the Chamber Judge made in the liquidation of the defendants it was ordered that the liquidator should sell the properties mortgaged to the plaintiff and hold the sale-proceeds subject to the amount due to the plaintiff.

On the 23rd of December 1909 the liquidator sold the said properties for the sum of Rs. 15,25,000 and on the 10th of February 1910 the liquidator paid to the plaintiff the sum of Rs. 6,49,024, being the amount of the claim of the plaintiff in respect of the plaintiff's first mortgage of six lacs.

The plaintiff thereon sued the defendants for a declaration that he was entitled to a charge on the balance of the said sale-proceeds for the sum of Rs. 2,09,435-9-9, being the said advance of rupees two lacs and interest and for payment of the said sum.

In their written statement the defendants submitted that the receipt of the 5th of August 1909 did not effect a charge on the defendants' property. The defendants denied that any

resolution had been passed by the defendants' Board authorising the creation of a charge or that a duly constituted Board existed at the date of the receipt. They also claimed that the defendants were precluded from creating a charge in favour of the plaintiff on account of the existence of a resolution passed by the defendants in favour of the Bank of India, notice of which should be imputed to the plaintiff through his *munim* Dani, who was also his nominee on the defendants' board and through whom, as the defendants alleged, the loan from the plaintiff had been arranged, and who had notice of the resolution.

Jinnah, with him *Strangman* (Advocate General), for the plaintiff.—The resolution of June 1907 came to an end in June 1908. The loan was renewed and the Bank received the liquid assets of the Company as security.

Equity takes that as done that ought to have been done. This is an agreement to give a legal mortgage and consideration is paid: therefore there is an equity in favour of the plaintiff: *In re Hurley's Estate*[1].

On the question of notice, (Contract Act, section 229), the loan was transacted by the plaintiff, not by Dani.

This is a charge created by operation of law. See *Govind* v. *Parashram*[2]; *Holroyd* v. *Marshall*[3].

Bahadurji, with him *Setalvad*, for the defendants.

DAVAR, J.:—In this case some very interesting and important questions of law arise for consideration, and therefore it is necessary to set out accurately the facts as they are either admitted or proved, before entering into a discussion of the several points to be decided between the parties.

The plaintiff, Raja Bahadur Shivlal Motilal, is a wealthy banker of Hyderabad (Deccan) who carries on an extensive business as banker, merchant and commission agent, through his *munim* and other servants in Bombay. The defendant is a

(1) [1894] 1 I. R. 488. (2) (1900) 25 Bom. 161.
(3) (1861) 10 H. L. C. 191.

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Joint Stock Company incorporated under the provisions of the Indian Companies Act of 1882 and is now in liquidation. The principal director of the Company and the senior partner in the firm of its Secretaries, Treasurers and Agents was the late Dwarkadas Dharamsey, who, after perpetrating many daring financial frauds, on the 28th of August 1909 committed suicide. Immediately on the death of Dwarkadas a petition was presented to this Court, and by an Order made on the 31st of August 1909 Mr. R. D. Sethna was appointed provisionally the official liquidator of the Company.

The plaintiff, Raja Bahadur Shivlal Motilal, had on the 15th of April 1905 advanced to the Company six lacs of rupees and obtained a mortgage of the Mills belonging to the said Company. It appears that, while the first mortgage was subsisting, the defendant-Company was in need of more money, and its principal director and agent Dwarkadas approached the plaintiff, who happened then to be in Bombay, in the beginning of August 1909, and requested him to advance a further sum of five lacs of rupees on the same terms and conditions as the first advance of six lacs and offered to execute a further charge on the Mills property in favour of the plaintiff. When the proposal was made to him, the plaintiff said he would consider it.

On the 5th of August 1909 Dwarkadas again approached the plaintiff and represented to him that he was in urgent need of two lacs of rupees that day and asked the plaintiff to make that advance. The plaintiff's affairs in Bombay were then managed by his *munim* Jeynarain Indumal Dani. Under the terms of his mortgage of the 15th of April 1905, Exhibit A, the plaintiff was entitled to have a nominee of his appointed a director of the Company to look after his interests and, in terms of the agreement in the said mortgage contained, the plaintiff had nominated Jeynarain Dani to be such a director and he held that office till the 12th of July 1909 on which date he sent in a letter (Exhibit No. 28), resigning his office as such director. Dani consequently was not on the board of the defendant-Company's directorate on the 5th of August 1909, when Dwarkadas pressed the plaintiff for a part of the proposed

loan of five lacs on a further charge of the Company's property already mortgaged to him.

Before acceding to Dwarkadas's request, the plaintiff consulted Dani and asked him what he thought of the matter, and Dani, after some conversation with Dwarkadas, told the plaintiff that there was no objection to his making the second loan. On this the plaintiff agreed to advance two lacs of rupees on that day on certain terms and conditions which were embodied in a document which was submitted to the plaintiff's Solicitor Mr. Bhaishanker on the plaintiff's behalf and, on Mr. Bhaishanker approving of the document, the same was executed and handed over to the plaintiff and a sum of two lacs of rupees was on that day paid by the plaintiff to the defendant-Company. The defendant-Company admits receipt of these two lacs of rupees and does not dispute its indebtedness to the plaintiff in that sum in addition to the sum due under the mortgage. The document executed on the 5th of August 1909 is Exhibit B in this case. The plaintiff contends that under the terms and provisions of that document, coupled with the events that happened thereafter, he is entitled to a charge on the mortgaged property of the defendant-Company and is entitled to rank as a secured creditor to the extent of two lacs advanced by him on the 5th of August 1905 and interest thereon. The mortgaged property, the Mills belonging to the defendant-Company, were, under the orders of this Court, sold on the 23rd of December 1909 for Rs. 15,25,000. On the 10th of February 1910 the liquidator paid to the plaintiff, out of the sale-proceeds of the said properties, the sum of Rs. 6,49,024-15-1 in full satisfaction of the plaintiff's claim under his mortgage of the 15th of April 1905. The plaintiff was referred to a suit to establish his charge and the liquidator was ordered to hold a sum sufficient in his hands to satisfy the plaintiff's claim for two lacs and interest out of the sale-proceeds, should he succeed in establishing his charge.

The main question in this suit therefore is whether the plaintiff is entitled to a charge on the defendants' property, and to rank as a secured creditor, or merely to share rateably as an

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ordinary creditor of the defendant-Company. The Company's affairs were found to be in hopelessly involved condition on the death of Dwarkadas and the unsecured creditors are not likely to be paid anything more than a small percentage on the moneys due to them.

The document of the 5th of August 1909 is by far the most important Exhibit in this case and I think it is desirable to set it out *in extenso* here.

Bombay, 5th August 1909.

Re TRICUMDAS MILLS, LIMITED.

Received from Raja Bahadur Shivlal Motilal the sum of rupees two lacs for and on account of the above Mills in part payment of the sum of rupees five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said Mills as a further charge subject to the following arrangement, namely, that the Raja Bahadur will, after inspection of the Mills on or before Monday next, decide whether or not he will advance the said sum of rupees five lacs as a further charge. In the event of his deciding to make such advance, the Company will execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at 7 per cent. on the same terms and conditions as are contained in the original mortgage for rupees six lacs now subsisting in favour of the Raja Bahadur, subject to the modification that in the event of such further charge being executed the original loan of six lacs and the further advance of rupees five lacs shall be repayable six years after the date of the further charge and that on execution of the further charge the (sum) of rupees five thousand five hundred shall be paid by the Company to Raja Bahadur as and by way of commission. In the event of Raja Bahadur deciding not to make the further advance the said sum of rupees two lacs, together with the original loan of rupees six lacs, shall be repaid immediately with interest at 7 per cent. per annum on the aggregate amount until payment, together with interest at 3½ per cent. per annum on the said sum of six lacs for the unexpired term of the mortgage.

This document was originally stamped with one-anna stamp and bears the seal of the Company stated to be affixed in the presence of two of its directors, Dwarkadas Dharamsey and Mr. Vishvanath P. Vaidya, who have signed the document, and is countersigned by the firm of Tricumdas, Dwarkadas & Co., the Secretaries, Treasurers and Agents of the defendant-Company. After the advance of two lacs on the 5th of August the plaintiff had the Mills surveyed by a competent engineer in the employ of Messrs. Greaves, Cotton & Company and paid him Rs. 500 as his fee for such survey and report. He himself

went round and saw the Mills and was satisfied that he would be quite safe in making a further advance of five lacs on the security of the Mills property. Accordingly he instructed his solicitors to address a letter to the defendant-Company on the 9th of August 1909 intimating that he was prepared to lend to the Company the sum of three lacs, being the balance of five lacs which was the amount the Company had asked him to advance on the security of their property. The receipt of this letter, Exhibit F, was, after some hesitation and difficulty, admitted by the learned counsel for the defendant who stated, at the end of the plaintiff's evidence, that he was satisfied that the letter must have been sent and received by the Company. There is no doubt whatever that this letter was sent and must have been received by the defendant-Company. Assuming that there would be no difficulty whatever, the plaintiff's solicitors prepared a formal deed of further charge and a fair draft thereof was made and sent to the Company for its approval on the 20th of August 1909. Exhibit M is the letter which accompanied the fair draft. To this letter there was no reply and it is quite obvious that at this time the Company's affairs were in great confusion and Dwarkadas must have been in great mental distress. That the plaintiff's solicitors must, about this time, have also anticipated difficulties and were on the alert to see that their client's interests were safeguarded, is quite clear from the steps they took to secure their client as far as possible. On the 23rd of August 1909, after some negotiations with the Collector, they got the document, Exhibit B, stamped with a stamp duty of Rs. 1,000-8-0 and on the following day, the 24th of August, they lodged the same for registration. It appears that they were faced with difficulty in having the document registered because it contained no description of the property. That description was added at the foot of the document and was signed by the plaintiff's *munim* Jeynarain Dani on the 1st of September 1909. Mr. Vishvanath P. Vaidya, one of the executing parties, admitted execution before the Registrar, and, on the 3rd of September, Dwarkadas's eldest son Tricumdas, a partner in the firm of Tricumdas Dwarkadas & Co., admitted his signature in the

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name of his firm and later on, on the 10th of September, admitted his late father's signature on the said document and the document then was duly registered.

On behalf of the plaintiff, Mr. Jinnah, who has throughout the hearing expended much labour and argued with great skill and conspicuous lucidity, contended that even if the document of the 5th of August, Exhibit B, did not by itself create a charge on the Mills property, that document, coupled with the letter of the 9th of August 1909, Exhibit F, gave his client an undoubted charge on the said property. He based his contention on the principle that equity will assume that what was intended to be done was done and that, having regard to his client's readiness to advance the balance of three lacs of rupees and have a further charge executed in his favour, the defendant-Company must be taken to have given a charge to the extent of the advance already made.

As against this contention, Mr. Bahadurji has urged some very serious objections which require to be most carefully considered. The learned counsel contended that no charge on the property of the Company could be created without a resolution previously passed by its Board of Directors authorising the creation of such a charge, that no such resolution was passed previous to the execution of Exhibit B, that as a matter of fact there was no Board on the date when the two lacs were received and Exhibit B was executed, that the document itself does not create a charge and was not intended to create a charge, and that the Company was at that date labouring under an incompetency which precluded them from giving or creating any further charge. It was further urged that this incompetency was well known to the plaintiff's *munim* Jeynarain Dani, who was a director of the Company, as the nominee of the plaintiff (see Exhibit No. 21), and that the knowledge of Dani must be taken to be the knowledge of the plaintiff and therefore, if the plaintiff made the advance with the presumed knowledge of this incompetency, he could not maintain his claim to the charge. There is no doubt that the directors passed no resolution authorising the creation of any

charge previous to the 5th of August 1909, when the plaintiff advanced the two lacs of rupees in question, and in my opinion there is also no doubt that on that day, the 5th of August 1909, there was not a properly constituted Board of Directors of the defendant-Company. Article 90 of the Articles of Association requires that there should be not less than four directors and not more than seven, exclusive of the director *ex officio*. Previous to June 1909 there were six directors of the Company,—Dwarkadas, his son Tricumdas, Mr. Vishvanath P. Vaidya, Mr. Mulraj Khatao, Mr. Narotam Morarji Goculdas and Mr. Jeynarain Dani. On the 17th of June 1909 Mr. Mulraj Khatao wrote a letter from Poona resigning his office, and on the same day Mr. Narotam Morarji Goculdas in Bombay wrote to the same effect. On the 12th of July 1909 Mr. Dani also sent in his resignation. It appears that Dwarkadas succeeded in persuading Mr. Narotam to withdraw his resignation on the 4th of July and to make an endorsement to that effect on his letter. He evidently succeeded in persuading Mr. Mulraj, in spite of his resignation, to attend a meeting of the directors held on the 23rd of July, which meeting was also attended by Mr. Narotam. Article 104 provides that a director may at any time give notice in writing of his wish to resign and, on the expiration of the fifteen days from the service of such notice or the previous acceptance of his resignation by the Board, his office shall be vacant. Mr. Mulraj never at any time withdrew his resignation, and, under the provisions of the Article I have just referred to, he must be taken to have vacated his office fifteen days after the receipt of his letter by the Company, and he must be taken to have vacated his office on the 3rd of July counting the fifteen days from the 18th of June which was the day on which his letter from Poona must have reached the Company. Similarly, Mr. Narotam Morarji Goculdas's office was vacated on the 2nd of July, he having written his letter in Bombay and sent it to the Company on the 17th of June. So that on the 4th of July his withdrawal is of no use. He had ceased to be a director and it was not competent in him to withdraw the resignation which had previously thereto taken effect under the provisions of Article 104.

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Taking therefore into consideration these three letters, Exhibits 26, 27 and 28, I find that on the 5th of August 1909 there were only three directors—Dwarkadas, Tricumdas and Mr. Vaidya—and therefore there was no properly constituted Board in existence. What the effect of the absence of a resolution authorising the creation of a charge and the non-existence of a properly constituted Board of Directors of the defendant-Company has on the plaintiff's contentions, I will discuss later on, after I have dealt with the question of the Company's incompetence or disability to create any charge on the 5th of August 1909.

The alleged incompetence of the Company is said to arise from the following facts :—

While the plaintiff's mortgage of the 5th of April 1905 was running, the defendant-Company seems to have been in want of more moneys, and Dwarkadas on behalf of the Company applied to Mr. Stringfellow, the Manager of the Bank of India, for a loan of three lacs of rupees. At a meeting of the Board of Directors of that Bank held on the 7th of June 1907 the proposal was considered and it was resolved "that a fixed loan of three lacs be given at 6½ per cent. on condition that the Company agrees not to further mortgage or charge the property of the Mills *during the currency of the loan.*" See Exhibit No. 9.

At a meeting of the Board of Directors of the defendant-Company held on the 11th of June 1907 the Bank's resolution was considered and it was resolved that the condition which the Bank sought to impose on the Company should be accepted and that the Chairman be authorised to give to the Bank a letter of undertaking in terms of that condition. See Exhibit No. 22. This acceptance was communicated to the Bank by a letter dated the 11th of June 1907, Exhibit No. 11, written on behalf of the Company by Tricumdas Dwarkadas & Co., the Secretaries, Treasurers and Agents of the Company. A promissory note, Exhibit No. 10, in favour of the Bank was duly executed on the same date. A copy of the resolution was also sent to the Bank. The wording used in the resolution passed by the Company

differs slightly in phraseology from the resolution of the Board of Directors of the Bank. The Company's resolution recites that one of the terms of the loan was that the block property of the Company was not to be further encumbered beyond the mortgage for six lacs in favour of Raja Bahadur Shivlal Motilal, *so long as the loan from the Bank was not paid off.* It was the original intention of the parties that the Company should pass a letter of undertaking to this effect in favour of the Bank and the Company authorized the Chairman of the Board of Directors to give such letter of undertaking. In his letter of June 11, 1907, Exhibit No. 13, Mr. Stringfellow writes that the draft letter of undertaking contemplated between the parties would be forwarded to the Company as soon as it was ready. As a matter of fact, however, the letter of undertaking was never drafted by Mr. Stringfellow, was never sent to the Company, and was never executed by the Chairman. The Bank seemed to have been quite satisfied with the resolution passed by the Company. Although the promissory note was, in form, payable on demand the understanding between the parties, as appears from Exhibit No. 22, was that the loan should be for a fixed period of one year. It seems that when the period of the loan was about to expire, the defendant-Company was unable to pay off the loan, and a few days before the 11th of June 1908, which was the due date for repayment of the loan, Dwarkadas approached Mr. Stringfellow and asked that the loan might be renewed for another year. This proposal was placed before the Board of Directors of the Bank at their meeting of the 3rd of June 1908 and Exhibit No. 14, the minutes of that meeting, record as follows:—"Tricumdas Mills fixed loan of three lacs due 11th June now running at 6½ per cent. Renewal requested. Resolved:—Renew at 7 per cent. if possible; if not, at same rate."

The loan, as appears from Exhibit No. 20, the fresh promissory note executed by the Secretaries, Treasurers and Agents of the Company on the 11th of June 1908, was renewed at the same rate of interest and, although as in former case the note was payable on demand, it was understood between the parties

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that the renewal was for another year. This is clear from Circular No. 72 issued by Tricumdas, Dwarkadas & Co. on the 12th of June 1908 to the directors of the Company in which it is stated that a renewal of the loan had been arranged for a year certain. This arrangement made by Dwarkadas with the Bank was confirmed at a meeting of the Company's directors held on the 6th of August 1908, see Exhibit No. 24. At the end of the second period, the defendant-Company was again unable to repay the Bank of India loan, and Dwarkadas in an undated letter, Exhibit Y, which seems to have been received by Mr. Stringfellow on the 2nd of June 1909, asks him to renew the loan falling due on the 11th for another year. Dwarkadas however saw Mr. Stringfellow two or three days before the due date and told him that he "did not want the renewal and that he was going to arrange to pay off the loan."

Mr. Stringfellow says that from Dwarkadas's conversation on that occasion he "gathered that he was arranging to obtain a loan on the second mortgage of the Mills from Shivlal Motilal and was intending to pay off the Bank from that loan."

Mr. Stringfellow waited till the 11th of June 1909 when the loan fell due and, as no payment was made, he became anxious about the safety of his money. On Sunday the 13th he called upon Dani at his bungalow and reminded him of the resolution passed in 1907 when the loan was first made. Dani seems to have given him no satisfactory answer and thereupon he saw Sir Sassoon J. David, the Chairman of the Board of his Bank's directors. Sir Sassoon two or three days after the interview handed to Mr. Stringfellow a letter from Dwarkadas, dated the 13th of June 1909, Exhibit No. 15. In that letter Dwarkadas states that the Tricumdas Mills are not secondly mortgaged to anybody nor has any undertaking not to mortgage been given to anybody except the Bank of India and, as to the Tricumdas Mills loan, he says it was then under certain negotiations and he would pay off the same within a fortnight. The loan however was not paid off within the fortnight. On Mr. Stringfellow, at the expiration of the fortnight, making a demand for payment, Dwarkadas again saw him and asked for three

months' time for the repayment of the loan. The directors of the Bank of India at the Board meeting of the 30th of June 1909 resolved that "the amount due may be renewed for a further period of three months on the same terms as the previous loan with the addition of a full legal lien to be given to the Bank on all the stocks in process."

The Company agreed to give the further security required and a document, Exhibit T, was executed in pursuance of that arrangement on the 23rd of July 1909. About this time rumours as to the financial condition of Dwarkadas and his Mills of a disquieting nature evidently reached Mr. Stringfellow and made him more anxious, and his letter, Exhibit U, dated the 26th of July 1909, addressed to the Agents of the defendant-Company gives clear indications that for the first time he woke up to the fact that the resolution which was passed on the 11th of June 1907 had never been either passed again or confirmed on two subsequent renewals of the loan. Making the return of the old promissory note passed by the Company a pretext for writing, he, in that letter, recapitulates the securities which the Bank held and amongst such he mentions the resolution of the 11th of June 1907, and ends the letter in the following words:—"Please confirm the resolution as of this date. Its terms are that the block property of the Company shall not be further encumbered beyond the mortgage of six lacs in favour of Raja Bahadur Shivlal Motilal so long as the loan from the Bank of India Limited is not paid off." No reply was sent to this letter and Mr. Stringfellow's anxiety became more tense and on the 31st of July 1909 (Exhibit V) he addressed a peremptory reminder in the following words:—"I have not yet received confirmation of the resolution referred to in my letter of the 26th instant. Please give this letter your attention forthwith."

Even this fails to bring any response, and on the 5th of August 1909 Mr. Stringfellow again writes another letter, Exhibit W, in which he says: "With reference to my letter of the 26th ultimo, I have not yet received confirmation of the resolution and shall thank you to send the same early."

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This also brings no response and in the meanwhile on the same day Dwarkadas obtained from the plaintiff two lacs of rupees under the circumstances which I have set out in the early part of this judgment. On the 10th of August 1909 Mr. Stringfellow addresses a private and confidential letter, Exhibit C, to the plaintiff in which he states that he was informed that the plaintiff had agreed to give a further advance to the Tricumdas Mills on mortgage. He draws the attention of the plaintiff to the resolution of the 11th of June 1907 and informs him that a sum of Rs. 3,51,837-11-6 is due by the Company to the Bank and intimates that that sum must be repaid to the Bank before any further mortgage could be executed. The plaintiff's solicitors on the 14th of August inform Mr. Stringfellow by their letter, Exhibit No. 4, that their client had already agreed to advance five lacs of rupees on a further charge of the Company's property which had already been mortgaged to him and that in pursuance of that agreement he had paid two lacs on the 5th of that month in part payment of the five lacs, and further intimate that their client had agreed to pay the balance as soon as the Company should execute a deed of further charge in his favour. Some further correspondence of no importance takes place between Mr. Stringfellow and the plaintiff's solicitors and nothing of importance happens till the 28th August when Dwarkadas committed suicide and immediately thereafter the Company was taken in liquidation.

The facts I have set out above are based entirely on the documentary evidence recorded in the case and on the evidence given before me by Mr. Stringfellow. That evidence is distinguished by great candour and I accept the story told by Mr. Stringfellow as a correct and accurate version of all that took place from the time negotiations were opened by Dwarkadas with him for the loan in June 1907 up to the time of his death. On those facts arise the questions for consideration whether, on the 5th of August 1909, when the plaintiff advanced two lacs of rupees to the defendant-Company, the resolution of the 11th of June 1907 was subsisting and in force, or whether it had exhausted itself at the expiration of the fixed

period of the loan first made by the Bank, and secondly, assuming that the resolution was in force, whether the *defendant-Company* can by reason of such resolution successfully plead its own incompetency to give a charge on the 5th of August 1909.

After a careful and anxious study of the documents I have referred to above and of the evidence given by Mr. Stringfellow, I have come to the conclusion that the resolution originally passed on the 11th of June 1907 was exhausted at the end of the twelve months. That was the period agreed upon between the parties as the period of "the currency of that loan," and that was the period at the end of which the Bank was to be paid off. If no new arrangement had been made and the defendant-Company had committed default in payment the resolution would have continued to be in force till such time as the loan was paid off. But after the period of currency of the loan as agreed upon between the parties had expired, the Bank chose to enter into a fresh agreement with the Company and the renewal of the loan was attempted by the Bank to be at a higher rate of interest but was eventually agreed to be at the same rate, and under those circumstances the renewal of the loan, as it is called, must be treated as a fresh transaction beween the parties. Not to further charge or mortgage the Company's property during the second period of the loan was not a term imposed upon the Company or insisted on by the Bank. When, again, the loan was renewed on the 30th of June after default had been committed in payment at the expiration of the second period and the fortnight beyond the expiry of that period, the Bank imposed other conditions and insisted on having the security of the liquid assets of the Company and actually obtained an agreement giving them a lien on certain property of the Company: the Bank never referred to or insisted on any resolution not to further charge or mortgage the Company's block property. It is possible, as Mr. Stringfellow says, that there was in his mind an impression that the original resolution was in force all the time, but if that was his impression, in my opinion, the

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impression was an erroneous one, and the conclusion to which I have arrived at is that the original resolution of the Company came to an end when the Bank entered upon negotiations for the renewal of the loan and agreed to renew it in June 1908. That some such apprehension entered the mind of Mr. Stringfellow himself, when he found that the Mill was in difficulties, is abundantly clear from his letters, Exhibits U, V and W.

It seems to me, however, that this question as to whether the resolution was or was not in existence and in force on the 4th of August 1909, is of secondary importance when the next question is taken into consideration, namely, is it open to the defendant-Company to plead its own incompetency to defeat the plaintiff's claim to a charge? I am now assuming, for the purposes of considering this question, that either on the 5th or 9th of August the plaintiff did obtain a valid charge on the Company's property. Whether he did or did not is a question that I propose to consider later on, but I will approach the consideration of the right of the Company to plead this incompetency on the assumption that a charge was validly created. Assuming that the resolution not to further charge was in existence and that the defendant-Company, in breach and violation of their ageement not to further charge, had given a charge to the third party, it is possible that the Bank may have been entitled to plead the Company's incompetency against that third party and to ask that his charge may be postponed till such time as the Bank's debt was paid off. Very nice questions of law would then arise between the Bank and such third party, but can it be permissible to the defendant-Company to say, "we committed a breach of our undertaking and in violation of our agreement, we gave a charge to a party which we were not competent to do. Therefore the charge must be defeated." To entertain such a plea and to allow the Company successfully to urge such a contention would be to encourage a fraudulent and defaulting party to plead its own wrong and its own misconduct in order to defeat a claim against itself. Under that resolution, the Bank of India may have had its rights and its remedies but the

Bank filed a suit against the Company and with knowledge of the plaintiff's claim to a charge deliberately left him out of their suit. In that suit they have been content to take a consent decree and Mr. Stringfellow told the Court that he hoped the whole of his Bank's claim would be satisfied. In any event for the deficit, if any, after the realization of the Bank's securities, the Bank has chosen deliberately to rank with the unsecured creditors of the Company. In my opinion it would be in the very highest degree iniquitous to allow the defendant-Company to plead its own incompetency, its own wrong, its own breach of undertaking, in resisting the claim of the plaintiff, if the plaintiff's claim is a just one, and I hold that, even in the assumption that the resolution of the 11th of June 1907 was in force on the 5th or the 9th of August, the incompetency imposed thereby on the Company cannot be pleaded by the defendant-Company in its own favour and against the plaintiff.

It was further urged that the plaintiff must be taken to have knowledge of this incompetency and that, if for no other reason, for that alone he is not now entitled to make the claim he makes in this suit. The plaintiff has given his evidence before me. His evidence is very clear and very emphatic and I have no reason whatever to disbelieve any single material statement that he has made to me in the course of his evidence. He denied that he had any knowledge whatever of the Company's undertaking by its resolution of the 11th of June 1907. I accept his denial and it is to be noted that the learned counsel of the defendant-Company has not argued that the plaintiff had any *actual* knowledge of the Company's alleged incompetency. What was argued before me was that his *munim* Dani was on the Board of Directorate of both the Bank of India and the defendant-Company and that he at all events knew of the resolution and *his* knowledge must be taken to be the knowledge of the plaintiff. It is a significant fact that neither the plaintiff nor the defendants called Dani as a witness, and therefore I am unable to say with any degree of certainty whether he withheld this information from the plaintiff from corrupt motives, or whether he was under the impression that the resolution had exhausted itself at

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the end of the first year of the loan. That he could not have forgotten that a resolution to that effect had been passed is clear from the fact that Mr. Stringfellow on the 13th of June 1909 drew his attention to such a resolution having been passed. Whatever may have been his opinion as to whether the resolution was or was not in force, it was clearly his duty, when he was consulted by his master on the 5th of August, to have told him that in 1907 the Company had undertaken not to further mortgage their property and that the Bank of India's loan was still subsisting. That he did not communicate this information to the plaintiff is beyond all doubt, for, if the plaintiff had the slightest notion that such a resolution had been passed, he never would have risked such a large sum of money without further enquiry and without himself seriously considering and consulting his solicitors as to whether he should or should not make the advance. Dani was specifically asked by the plaintiff whether there was anything against his advancing the two lacs of rupees, and Dani in clear and explicit terms told the Raja that there was no objection to lending the two lacs of rupees. He repeated that statement to Mr. Bhaishanker, the Raja's solicitor, who attended to this matter on his behalf.

Taking all the surrounding circumstances and the probabilities into consideration I am reluctantly forced to come to the conclusion that Dani, whose duty it was to tell his master that a resolution had been passed by the Company quite independently of his belief as to whether it was then in force or not, deliberately suppressed this information from the plaintiff from corrupt motives. Dwarkadas on that day was evidently in sore distress for want of moneys. His need was urgent and immediate. When he applied to the Raja for part advance of the contemplated loan of five lacs, the Raja told him to bring his *munim* to him. Dwarkadas then approached the *munim*. Even while the Raja was questioning his *munim*, he says Dwarkadas and Dani had some conversation amongst themselves and Dani then said there was no objection to make the advance of two lacs. The conviction forced on my mind is that Dani deliberately omitted to inform the plaintiff about the

passing of this resolution dishonestly, and that such dishonesty must have been the result of his corruption at the hands of Dwarkadas.

Under those circumstances and also having regard to the fact that this was a transaction which was negotiated directly between the defendant-Company's agent and the plaintiff and *not* between the Company's agent and the plaintiff's *munim*, the provisions of section 229 of the Indian Contract Act cannot be made applicable and the plaintiff fixed with the knowledge of the alleged incompetency of the defendant-Company.

The English Law on this subject, as the result of the authorities on this head, is summed up in one short paragraph in Vol. I of Halsbury's Laws of England at page 216, where it is stated as follows :—

" Moreover, where the agent, though acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance "

It is clear to my mind that in this instance Dani, in concealing the information which he clearly had from his master, was guilty of fraud and misfeasance against the plaintiff, and the plaintiff cannot possibly be held to have information and cannot be fixed with knowledge of things which were fraudulently concealed from him by his agent.

The net result therefore is that I find, in the first instance, that the resolution, on which the contention of the Company's incompetency is based, had exhausted itself on the 11th of June 1908 and that it was not in force on the 5th of August 1909. I also hold that the plaintiff when he advanced the two lacs of rupees to the defendant-Company had no knowledge whatever of such a resolution having been passed, that such knowledge was fraudulently concealed by Jeynarain Indumal Dani from his master, and that his master, the plaintiff, could not be fixed with the knowledge which had been from corrupt motives withheld from him,

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I further hold that even if the incompetency had existed as alleged, the defendant-Company can, under no circumstances, be permitted to plead the same in derogation of the rights and claims of the plaintiff, if he is able to establish any, to a charge on their property.

I will now proceed to discuss the effect of my findings, that on the 5th of August 1909, when Exhibit B was executed, the Board of Directors of the defendant-Company was defective, in that there were only three directors instead of the minimum four, as required by the Articles of Association, and that previous to the execution of this document no resolution had been passed by the defendant-Company's Board of Directors authorizing the creation of a charge. These undoubtedly are irregularities. The question is, do these irregularities invalidate a charge in favour of third parties without notice of such irregularities and entitle the defendant-Company to plead the irregularities of their own Board of Directors as a bar to the successful establishment of a claim against themselves?

I will discuss these questions again on the assumption that a valid charge was created in favour of the plaintiff. A close study of the authorities establish beyond all doubt that in law neither the want of a resolution nor the defect in the Board of Directorate can affect adversely the rights of third parties who have no knowledge of the existence of such infirmities. The authorities on the subject are both clear and conclusive. It is not necessary to go back further than the case of *Royal British Bank* v. *Turquand* [1]. In that case the deed of settlement of a Company provided that the directors might borrow on bonds such sums as should from time to time by a general resolution of the Company be authorized to be borrowed. It was averred that there had been no such resolution authorizing the making of the bond in that case. Lord Campbell, in delivering the judgment, says (p. 259):—

"In this case the bond sued upon is allowed to be under the seal of the Company.... A *prima facie* case therefore is made for the plaintiffs... No illegality appears on the face of the bond or condition.... If no ille-

(1) (1855) 5 E. & B, 248.

gality is shown as against the party with whom the directors contract under the seal of the Company, excess of authority is a matter only between the directors and the share-holders."

The Court in that case gave judgment for the plaintiffs. This case went on appeal to the Exchequer Chamber, and that Court in its judgment says (p. 332) :—

"We may now take for granted that the dealings with these Companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legimately done."

The whole Court concurred in confirming the judgment of Lord Campbell in the Court of the Queen's Bench; and this case has been consistently followed and referred to with approval in every subsequent case where the same question has arisen[1].

In *In re Land Credit Company of Ireland. Ex parte Overend, Gurney, & Co.*[2], Lord Justice Selwyn discussing the same question observes (p. 469) :—

"If, on the other hand, as in the case of *Royal British Bank* v. *Turquand*[3], the directors have power and authority to bind the Company, but certain preliminaries are required to be gone through on the part of the Company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*[3]. That case . . . may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned."

In *In re County Life Assurance Company*[4], a Life Assurance Company by its Articles of Association appointed a Managing director, but the directors, who were named in the Articles and signed the Memorandum of Association, refused to act and passed a resolution that the Company should not carry on business or allot shares. Notwithstanding this reso-

(1) (1856) 6 E. & B. 327.
(2) (1869) L. R. 4 Ch. 460.
(3) (1855) 5 E. & B. 248.
(4) (1870) L. R. 5 Ch. 288.

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lution, the Managing Director and one of the share-holders persisted in carrying on business at the registered office of the Company and allotted shares and appointed directors. The Court, affirming the decision of the Master of the Rolls, held that a policy which a stranger effected at a Company's office and which was signed by three of the *de facto* directors and sealed with what purported to be the Company's seal, was binding on the Company. Lord Justice Giffard in the course of his judgment says (p. 293):—

"I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the General Act under which the Company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the Company that all matters of internal management have been duly complied with."

The case of *Mahony* v. *East Holyford Mining Company*[1] goes even further than the previous cases I have referred to. Here an individual, with some friends and dependants of his, started a Company called a Mining Company. Memorandum and Articles of Association were registered, subscriptions were obtained from persons becoming share-holders, and these subscriptions were paid into a bank. The bankers received a formal notice signed by a person, who described himself as a Secretary of the Company, that they were to pay cheques signed by "either two of the following three directors" and countersigned by himself in accordance with a "resolution passed this day." The bankers from time to time, while the business of the Company appeared to be going on, received cheques signed and counter-signed as described and duly honoured them. When the fund had been almost entirely drawn out, the Company was ordered to be wound up. It then appeared that there never had been a meeting of the share-holders nor any appointment of directors or of the Secretary but that the persons who had got up the Company had treated themselves as directors and Secretary and appropriated the moneys obtained from the subscriptions. The liquidator attempted to recover from the bankers the amount of the

(1) (1875) L. R. 7 H. L. 869.

cheques which they had paid, and the Court held that the bankers were not liable to pay to the Official Liquidator the moneys they paid against the cheques fraudulently drawn on the bank. Lord Hatherley, in the course of his judgment, observes (p. 893) :—

"On the one hand, it is settled by a series of decisions, of which *Ernest* v. *Nicholls*(1) is one and *Royal British Bank* v. *Turquand*(2) a later one, that those who deal with Joint Stock Companies are bound to take notice of that which I may call the external position of the Company. Every Joint Stock Company has its memorandum and articles of association; every Joint Stock Company, or nearly every one, I imagine . . ., has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the Company, and those who so deal with them must be affected with notice of all that is contained in those two documents. After that, the Company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed."

Lord Chelmsford, referring to the statement in the letter that a resolution had been passed, says (p. 890) :—

"I do not think that the bankers receiving this letter were bound to go inside the offices of the Company, to satisfy themselves that it had been so passed."

Many of the remarks made in the course of the judgments of their Lordships in this case, notably the remarks of Lord Hatherley on the duties of shareholders in cases of the kind under discussion, are very apposite and peculiarly applicable to the circumstances of this case. The authorities are equally clear and equally conclusive in cases where the irregularity consists of want of a properly constituted Board of Directors or want of quorum at meetings and is pleaded as a bar to the establishment of claims against the Company.

In *In re Scottish Petroleum Company*(3), the Articles of Association of the Company in question provided that the number of directors should not be less than four and it was

(1) (1857) 6 H. L. C. 401. (2) (1855) 5 E. & B. 248.
(3) (1883) 23 Ch. D. 413.

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further provided that two directors should form a quorum. Shares were allotted to certain parties when there was not a Board of four directors in existence. The Court however held that although there was not a Board of four Directors, the quorum of two was competent to allot shares.

In another case, *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*[1], it appears that the directors of that Company had power under their Articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of directors, at which two only were present, authorized the Secretary to affix the Company's seal to a mortgage which was accordingly done by the Secretary in the presence of the same two directors. It was held that as between the Company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid, Lord Halsbury observing, in the course of his judgment, that persons dealing with Joint Stock Companies were bound only to look at what one may call the outside position of the Company.

In the case of *Biggerstaff* v. *Rowatt's Wharf, Limited*[2], the question arose as to whether certain securities were validly hypothecated, and there it was held that persons dealing *bonâ fide* with a Managing Director were entitled to assume that he had all such powers as he purported to exercise, if they are powers which, according to the constitution of the Company, a Managing Director can have. Lord Justice Lindly observes (p. 102) :—

"Here the articles enabled the directors to give to the managing director all the powers of the directors. . . . The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bon fide*. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power."

Another case, *In re Bank of Syria*[3], is again very much in point on this question. The Articles of Association of the

(1) [1895] 1 Ch. 629. (2) [1896] 2 Ch. 93.
(3) [1900] 2 Ch. 272 : [1901] 1 Ch. 115.

Company provided that the number of members of the Council of Administration which was vested with powers to conduct the affairs of the Company should not be less than three, and that the Council might determine the quorum necessary for the transaction of the business. It was there alleged that the Council had passed a resolution fixing the quorum at three. The number of members of Council, however, became reduced to two, and the question arose whether a resolution passed and security given by two members of the Council in favour of persons who had no knowledge or notice of the irregularity was or was not valid. Mr. Justice Wright held that notwithstanding this irregularity, the security given was valid. The case, *In re Bank of Syria*[1], went to the appeal Court where the judgment of the lower Court was affirmed on this point, Lord Alverstone, Lord Chief Justice, observing that he thought that the authorities to which Wright J. had referred in his judgment, as showing that an objection such as was taken to the irregularity of the proceedings would not affect third parties, truly represented the law and that if the defect in the number of directors were the only objection, there could be no doubt as to the claim being valid.

This doctrine appears to have been followed in an earlier case, where the question was not one of mere irregularity but one of active fraud on the part of the agent of a Company. This is the case of *Shaw* v. *Port Philip Gold Mining Company*[2]. It appears in that case that it was the duty of the Secretary of the Company to procure the execution of certificates of shares in the Company with all requisite and prescribed formalities and to issue them to the persons entitled to receive the same. By a resolution of the directors of the Company it was provided that certificates of shares should be signed by one Director, the Secretary and the Accountant. The Secretary issued one of such certificates which was in the usual and authorized form and sealed with the Company's seal, but the signature of the director appended thereto was a forgery and the seal of the Company was in fact affixed thereto

(1) [1900] 2 Ch. 272 : [1901] 1 Ch. 115. (2) (1884) 13 Q. B. D. 103.

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without the authority of the directors. The Company refused to register the plaintiff as owner of the shares but the Court held that the Company were estopped by the certificate issued by their Secretary from disputing the plaintiff's title to the shares. Mathews J., in concurring with the judgment delivered by Stephen J., says (p. 108) :—

"I am of the same opinion, on the ground that the Company is responsible for the fraud committed by its agent while acting within the ordinary scope of his employment."

The last case I will refer to, and in date it is the latest, is, if anything, far stronger than the cases I have hitherto discussed. In that case of *Ruben* v. *Great Fingall Consolidated*[1], the facts were that the plaintiffs advanced in good faith a sum of money which they had borrowed from their bankers to the Secretary of the defendant-Company for their own purposes on the security of a share certificate issued to them by the Secretary which in accordance with the Articles of Association of the Company purported to be signed by two directors, to bear the Company's seal, and to be countersigned by the Secretary. It turned out as a matter of fact that the signatures of the directors were forgeries, and that the seal had been fraudulently affixed by the Secretary without any authority from the defendant-Company. The defendant-Compay resisted an application to register the plaintiffs' bankers in their books as the owners of the shares. It was held, on the authority of the case of *Shaw* v. *Port Philip Gold Mining Company*[2], that the defendant-Company were estopped by the certificate issued by their Secretary from disputing the right of the plaintiffs to have the names of their bankers registered as owners of the shares.

On these authorities it is impossible to hold that in this case if the plaintiff Raja Bahadur Shivlal Motilal acquired a charge on the property of the defendant-Company, that that charge is invalid and not binding on the Company because, at the time the charge was given, the Board of Directors had not passed a resolution authorizing the creation of such charge

(1) [1904] 1 K. B. 650. (2) (1884) 13 Q. B. D. 103.

and by reason of there being not at that time in existence a Board of Directors properly constituted, according to the requirements of the Articles of Association. The plaintiff and his legal advisers assumed, as they had a perfect right to assume, that what was being done was rightly and legitimately done and that all the requirements for the execution of the document, which was executed by the Managing Director and another Director of the defendant-Company and countersigned by the firm of its Secretaries, Treasurers and Agents and bore the Company's seal, had been duly complied with, previous to the execution of that document. The plaintiff and his solicitors had no knowledge whatever that the Board of the defendant-Company's Directors was defective for want of the minimum number of directors required by the Articles of Association. The plaintiff's solicitors had a perfect right to assume that the requisite resolution was previously passed and that everything that was done was done regularly and properly. The first time that the plaintiff's solicitors seem to have a suspicion of irregular proceedings on the part of Dwarkadas was after Mr. Stringfellow's letter to the plaintiff on the 10th of August 1909, Exhibit C. They were evidently put on enquiry then and immediately thereafter followed some very urgent communications between the partners in Bombay and Mr. Bhaishanker at Ahmedabad. They seem to have then only discovered that the requisite resolution had not been passed. Everything that could possibly be done to secure their client was then done by them. The agreement was sent to the stamp office and a stamp of Rs. 1,000-8-0 was paid to the Collector, the description of the property which was wanting was inserted at the foot of the agreement, and it was then lodged for registration and was susequently duly registered. I am asked to say that the registration is irregular, and therefore the document must be treated as if it had never been registered. I am afraid I am precluded from going into the question. I must look at the document as it is presented to me. It is duly stamped and registered, and I cannot here take cognizance of any irregularity in registration, assuming that any such irregularity really did exist, which is extremely doubtful.

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Does this document then, Exhibit B, by itself or taken in conjunction with the plaintiff's solicitors' letter of the 9th of August 1909, Exhibit F, create a charge on the property of the defendant-Company, so as to secure the advance of two lacs of rupees made by the plaintiff on the 5th of August 1909? In considering that question, which is the last and by far the most important in this suit, it is most essential to keep before one's mind the fact that Dwarkadas originally, in the beginning of August 1909, approached the plaintiff not merely for an unsecured loan of two lacs of rupees but for a loan of five lacs of rupees on the further mortgage of the property already mortgaged to him. It was at no time within the contemplation of the plaintiff or of Dwarkadas, the agent of the defendant-Company, that there should be an unsecured advance by the plaintiff of one single rupee. The plaintiff never at any time consented that any portion of his money should be advanced on any terms other than on the security of the Company's Mill property. The wording of the document itself leaves no doubt that the advance of part of the five lacs should be treated as a charge on the property. Exhibit B distinctly specifies that the amount of two lacs was received from the Raja Bahadur Shivlal Motilal on account of the above Mills "*in part payment of the sum of five lacs intended to be advanced by Raja Bahadur Shivlal Motilal to the said Mills as a further charge.*"

The plaintiff made this advance on that day to oblige the Company and to enable its agents to meet its urgent requirements. The plaintiff reserved to himself the option of advancing the balance or recalling the whole of his mortgage-debt including the two lacs on certain terms and conditions mentioned in that document. The defendant-Company reserved to itself no option. Exhibit B provides that in the event of the plaintiff deciding to make the advance, the Company "*will* execute a proper legal deed of further charge to secure the said amount of rupees five lacs with interest at 7 per cent. on the same terms and conditions as are contained in the original mortgage." On the 9th of August when the plaintiff exercised his option and intimated to the defendant-Company that he was prepared to make the advance of the balance of three lacs of rupees, the

Company had no option but to execute a deed of further charge in terms of their agreement. Such deed of further charge was prepared and tendered to the defendant-Company for execution. The defendant-Company was bound on the tender of the balance of three lacs of rupees to execute that further charge. They did not do so. Can they be allowed to plead again their own breach in their own favour and be heard to say, "We were bound to execute a deed of further charge but we did not do so and therefore the plaintiff's advance of two lacs must be treated as unsecured loan to us"? It would be in the highest degree iniquitous to allow the defendant-Company to do so, and in law the Company is not permitted successfully to raise this plea. The authorities on this point are quite as clear and quite as explicit as they have been on other points of law raised in this case.

In *Dighton* v. *Withers*[1], a party, referred to in the case as the intestate, being indebted to another, promised the solicitors of his creditors, whenever required by them, to execute to their clients or such other persons as they might direct, a legal mortgage of his equity of redemption in certain lease-hold premises, subject only to a prior mortgage. When the question arose as to what this promise amounted to in law, the Master of the Rolls, Sir John Romilly, said:—"I am of opinion, that this is a perfectly good mortgage. The intestate had no deeds to deposit, and he gave the best security he could by giving a memorandum in writing by which he promised the solicitors of his creditors to execute a legal mortgage. Well that is an equitable mortgage." And he directed that the residue should be paid to the creditors who were treated as second mortgagees.

In the two cases, *In re The Estate of Hurley* and *of Biddulph*[2], the decision of the Court was to the same effect. In *In re Hurley's Estate* there was an agreement, which ran as follows:—"In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money you may advance to me on

(1) (1862) 31 Beav. 423.

(2) [1894] 1 Ir. R. 488 at pp. 498 & 499.

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my promissory notes or bills of exchange." And in *In re Biddulph's Estate* there was an agreement in almost similar terms. It was held that these agreements created a valid equitable mortgage on lands and property of the parties executing the same at the time of the agreement for the amount of notes or bills of exchange remaining unpaid at maturity. The learned Judge, in deciding the cases, says :—

"If a person mortgages or agrees to mortgage all his lands a charge is created in law or in equity on all the lands of which he is then the owner. * * * * If there is an agreement to execute a legal mortgage from the date of the agreement, or, if the agreement specified a particular day on which, or a particular event after which, the agreement is to operate, then when the date arrives or the event happens, the equitable charge arises."

And it was held in both these cases that

"So soon as those bills or notes matured and remained unpaid the lands of the owner became subject to an equitable charge."

Again in *Tebb* v. *Hodge*[1], decided in the Exchequer Chamber, the decision of the Court was to the same effect. In that case the plaintiff agreed to give to one Barrows, and Barrows agreed to take the lease of a premises for twenty-one years and the plaintiff further agreed to lend or obtain for Barrows upon security of the said premises as fitted and licensed a sum of £1,000 two years at 5 per cent. This sum of £1,000 was premium which Barrows had agreed to pay to the plaintiff. Before any lease was granted or any money paid, Barrows became bankrupt and certain complications arose. The Court, affirming the judgment of the Court of Common Pleas, held that until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and Barrows and that the premises as fitted and licensed should stand the security for the £1,000 premium that Barrows had agreed to pay and consequently the plaintiff was held to be entitled to them as equitable mortgagee.

Ex parte Izard. In re Cook[2] is another authority for the same proposition. There the debtors agreed that they would, on demand, assign the lease of their premises and their business,

(1) (1869) L. R. 5 C. P. 73. (2) (1874) L. R. 9 Ch. 271.

the stock-in-trade and book-debts to the creditors for the advances they received from them. On the debtors becoming embarrassed, the creditors demanded execution of the assignment, in pursuance of the agreement, which was accordingly executed. This assignment was challenged by the trustee in bankruptcy on the debtors filing their petition. It was held that the agreement became a binding security on demand being made and that the assignment based on it was valid.

Eyre v. *McDowell*[1] and *Holroyd* v. *Marshall*[2] are authorities very much to the same effect as the cases I have discussed above.

Lastly, we have a case in our own Court which I think is good authority for establishing the same proposition, although the enunciation of law by Sir Lawrence Jenkins is not on a point on which the case was decided.

In this case, *Govind* v. *Parashram*[3], the parties adjusted their accounts and the debtor agreed to give a mortgage on certain specified immoveable property for a part of the balance that was found due on the judgment, it being agreed that a part of the debt should be paid off by a certain date. In the course of his judgment, Sir Lawrence Jenkins observes (p. 166) :—

"Did the plaintiff by virtue of the agreement actually obtain a charge on the property for the whole amount of the debt . . . . . the existing indebtedness constituted a valuable consideration, and it follows that even without the execution of the contemplated mortgage a good charge was created in the plaintiff's favour, which would prevail, not only against the first defendant, but also against the second defendant, who as a judgment creditor could not have a greater interest than his debtor."

It was argued by the learned counsel for the defendant-Company, that this was a mere obiter. It may be an obiter, but it enunciates the law in consonance with high authority and the source from which the obiter proceeds is entitled to very great respect.

(1) (1861) 9 H. L. C. 619. (2) (1861) 10 H. L. C. 191.
(3) (1900) 25 Bom. 161.

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Having regard then to the circumstances under which the sum of two lacs of rupees was advanced by the plaintiff, having regard to the language of the document executed on that occasion and to the contents thereof and the terms and conditions mentioned therein, having regard also to the action of the parties subsequent to the execution of that agreement and the events that followed, I have no hesitation in holding that a valid, legal and binding further charge was created in favour of the plaintiff against the mortgaged property of the defendant-Company for the two lacs of rupees advanced by the plaintiff on the 5th of August 1909, and there must be a decree in favour of the plaintiff as prayed by him in his plaint.

Decree for the plaintiff for two lacs of rupees with interest at the rate of 7 per cent. per annum from the 5th of August 1909 until payment and costs with interest thereon at 6 per cent. per annum also until payment. Such costs to include all charges and expenses properly incurred by the plaintiff in connection with the intended mortgage. The decree will declare that the plaintiff is entitled to a valid and subsisting charge upon the balance of the sale proceeds of the property of the defendant-Company referred to in paragraph 5 of the plaint and now in the hands of the liquidator and will direct the liquidator to pay on behalf of the defendant-Company out of the aforesaid moneys the amount of this decree in priority to the claims of all other creditors of the defendant-Company.

Attorneys for the plaintiff: *Messrs. Bhaishanker, Kanga & Girdharlal.*

Attorneys for the defendants: *Messrs. Payne & Co.*

Suit decreed.

H. S. C.