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monial Court and there establish the very facts which she relies upon in her present plaint. Apparently she has some objection to applying for a decree for judicial separation, but as I pointed out, as far as I can see, in the Matrimonial Courts, both in England and India, this is the only way by which a wife is entitled to get a decree for permanent alimony.

I may add that it appears that under the Parsi Matrimonial Act such questions of fact as are alleged in this case are questions which the Act specifically directs should be tried by the Parsi delegates in the Parsi Matrimonial Court, and not by the Judge.

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

Attorneys for the defendant: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *March* 16.

R. D. SETHNA, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE AND EFFECTS OF WILMOT HARRISON (APPELLANT AND DEFENDANT), *v.* GRACE EDITH HEMINGWAY (RESPONDENT AND PLAINTIFF).[*]

Indian Succession Act (X of 1865), section 190—Letters of Administration obtained by plaintiff after suit filed but before hearing and decree—Transfer of Property Act (IV of 1882), section 130—Order to banker to pay money held to the credit of customer, effect of when acted on—Stamp Act (II of 1899), section 36—Resulting trust.

One W had a deposit of Rs. 10,500 in a bank under a deposit receipt which fell due on the 7th of August 1912 W had a grand-nephew, H, to whom he wished to transfer the money, meaning that H should have the benefit of the money, but not intending that he should be able to make away with the money in W's life-time or to draw the interest without making due provision

[*] Appeal No. 62 of 1913 : Suit No. 699 of 1913.

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for W's maintenance. On the 8th of August 1912 W handed to H his deposit receipt duly endorsed and a letter to the following effect :—

"I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

"I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account."

H took these documents to the bank and asked for and obtained a new deposit receipt for Rs. 10,000, the balance of Rs. 500 in cash and Rs. 420 in cash by way of interest. On the 18th of October 1912 W died. On the 5th of August 1913 G, a grand-niece of W, filed a suit against H as administratrix of the estate of W, claiming that the sum deposited with the Bank, in the plaint stated to be Rs. 10,000, formed part of the estate of W and that the plaintiff, as administratrix of his estate, was entitled to the same. At the date of the filing of the suit G had not obtained Letters of Administration to W's estate but did obtain them before the hearing of the suit.

Held, that the plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration, and should on that account have been rejected on presentation, but that as the plaintiff had obtained Letters of Administration before the hearing and the hearing had been allowed to proceed, a decree passed in favour of the plaintiff was not contrary to section 190 of the Indian Succession Act.

Held further, that where money mentioned in a deposit receipt was immediately payable and the receipt was presented duly endorsed together with an order to pay a given individual that individual became the owner of the money upon payment by the banker or upon his promise to hold the money at the disposal of the payee, that an order on a banker to pay money which he held to the credit of a customer was not an assignment of a debt, but an authority to deliver property, which, if acted on, was equivalent to delivery by the customer, and that the letter of the 8th of August 1912 was such an order and had been acted on and though had an objection been taken at the hearing before the lower Court it might have been rejected for want of a stamp that such an objection could not be taken on appeal, the letter being on record.

Held further, that the intention of the donor, W, to benefit negatived the idea of any resulting trust in his favour.

ONE Charles Andrew Wakeford was a Government pensioner and a resident of Bombay. He had several relatives, including ten grand-nephews and grand-nieces, amongst these being the plaintiff to the present suit

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and one Harrison the original defendant. In addition to his pension Mr. Wakeford had the sum of Rs. 10,000 deposited with the Hongkong and Shanghai Bank. About the end of the year 1910 Mr. Wakeford seems to have made a will by which he left the said sum to certain relatives and others, the plaintiff and Harrison receiving shares.

Subsequently to making this will, in the year 1912, Mr. Wakeford, who was over 80 years of age, desired that his grand-nephew, Harrison, should look after him. About this time some coolness seems to have sprung up between the plaintiff and Mr. Wakeford. Harrison and his wife accordingly visited Mr. Wakeford at his house continuously from the 11th of July 1912 till the 15th of September 1912 when Mr. Wakeford went to live at Harrison's house and remained there, attended to by Harrison and his wife, until his death on the 18th of October 1912.

Shortly after Harrison and his wife began to visit Mr. Wakeford the latter formed the resolution to cancel his will and to make over the moneys deposited with the Hongkong and Shanghai Bank to Harrison subject to some such condition as that the latter should look after him while he lasted.

In July 1912 Mr. Wakeford had in fact mislaid the deposit receipt and on the 24th of July 1912 he went to the Bank with Harrison to inquire what formalities should be followed in order to enable him to recover the moneys deposited. He was given a form of indemnity which he took away with him. On the same day after his return from the Bank it seems that Mr. Wakeford in the presence of Harrison and of another witness tore up his will saying that it would not be required as he had transferred his money to Harrison. On the 4th of August 1912 the missing

deposit receipt was discovered. On the 7th of August Mr. Wakeford signed his name on the back of the deposit receipt and gave it to Harrison with a letter addressed to the Bank directing them to transfer the amount to Harrison. The latter took these two documents to the Bank but was informed that as he had not been identified by Mr. Wakeford the amount could not be dealt with. Harrison returned to Mr. Wakeford's house and at the latter's dictation wrote out the following letter, which was subsequently signed by Mr. Wakeford who also at the foot of the letter identified Harrison's signature :—

Bombay, 8th August 1912.

The Agent,
Hongkong and Shanghai Banking Corporation.

Sir,

I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

Yours truly,
(Signed) C. A. Wakeford.

This is my nephew's signature :—
(Signed) W. C. Harrison.
(Signed) C. A. Wakeford.

On the 8th of August 1912 Harrison went again to the Bank and handed in the deposit receipt and the last mentioned letter and received from the Bank Rs. 420, as interest due on the deposit, and Rs. 500 out of the principal sum deposited and a deposit receipt for Rs. 10,000 in his own name.

After the death of Mr. Wakeford on the 18th of October 1912 the plaintiff for the first time heard of the destruction of his will and of the transfer of the

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money deposited at the Bank into the name of Harrison. The plaintiff disputed the right of Harrison to the money and finally on the 5th of August 1913 filed the present suit against Harrison claiming the money as the administratrix of the estate of Mr. Wakeford. At that date the plaintiff had not obtained Letters of Administration but these were obtained by her on the 31st of October 1913.

On the 13th of November 1913 the case came on for hearing before Mr. Justice Macleod, who on the 17th of November gave judgment in favour of the plaintiff. The material portions of the learned Judge's judgment are the following :—

Now, on the 8th of August what was due to the deceased from the Bank was a debt of Rs. 10,500, that clearly under section 3 of the Transfer of Property Act was an actionable claim and the only way in which that could be transferred by the owner to another person was by a writing according to the terms of section 130. It is contended that Exhibit 3 satisfies the provisions of section 130 but it is quite clear that it does not. This writing is merely a notice to the person from whom the debt was due, asking him to hand over the amount of the debt to the defendant, but that is not sufficient to transfer the ownership in the debt. An obvious test is to see whether after this document had been executed the defendant could have sued the Bank on it. When a writing under section 130 has been executed, all the rights and remedies of the transferor vest in the transferee. But the mere direction by the owner of a debt to the debtor to transfer in his books the debt in the name of another party cannot give that other party any right to sue for the debt. This letter is merely a notice of transfer which after the transfer has been made the transferee can call upon the transferor to make under section 131. That is really sufficient to dispose of the case, as there was no transfer as required by law of the debt due by the Bank to the deceased, and, therefore, it remained up to the time of his death an asset belonging to him; but I had better deal with the other issues raised in the case, as this point was only taken by the plaintiff's counsel at a late stage in the case.....I am satisfied on the evidence that the deceased was anxious that the defendant should have the benefit of this money deposited with the Hongkong Bank..... .....What I think the evidence points to is this, that the deceased did not want to have the bother of having to sign documents and having to go to the Bank to recover interest, and he also did not want there to be any trouble after his death with regard to a will, but he wished that after his death

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the defendant should have the benefit of this money and that the defendant might be able to draw it without any further trouble. This could be effected by having the deposit receipt in the name of the defendant. I do not think that he intended that the defendant should be able to make away with the money during his life-time or that the defendant should be able to draw the interest without making due provision for his maintenance. All the evidence and all the surrounding circumstances of the case are perfectly in consonance with this finding.

Therefore, section 80 of the Trusts Act will apply. The defendant must be considered as holding the deposit receipt for the benefit of the legal representatives of the deceased. It has been argued further for the plaintiff that even if there was the intention to transfer the beneficial interest in this debt due by the Bank to the defendant, yet a Court of Equity would set it aside if it was satisfied that the donor was not fully aware of what he was doing. The case of *Anderson* v. *Elsworth*[1] has been cited in support of that proposition. However, I hardly think that the facts of the case are similar to the facts in this case. There is a considerable difference between a long legal document which a layman would find it difficult to understand without the effect being explained to him by a lawyer, and the gift of a sum of money. If the deceased had in his mind the giving away of these Rs. 10,500 and acted in such a manner as to make a gift an immediate gift of that sum it would be difficult to say that he did not know what he was doing or imagine circumstances from which the Court could hold that he did not know what he was doing.....

A point was raised that the plaintiff is not entitled to a decree because at the time the suit was filed she had not obtained Letters of Administration to the estate of the deceased. Section 190 of the Succession Act says "No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless Letters of Administration have first been granted by a Court of competent jurisdiction." Decisions under section 187 to the effect that the Court can give relief so long as probate has been granted before the decree apply also to section 190, therefore the plaintiff having obtained Letters of Administration is entitled to a decree.

Harrison appealed. He subsequently became insolvent and the Official Assignee was made a party to the appeal in his place.

Binning, with him *Shortt*, for the appellant :—

The plaintiff sued as the administratrix of Wakeford ; at the time the suit was filed the grant was not issued.

(1) (1861) 3 Giff. 154

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[The Court considers that there is nothing in the point now.]

This was a novation ; no writing was necessary under section 130 of the Transfer of Property Act.

If it was an assignment, the moneys were transferred. Contends that the letter of the 8th of August 1912 was a sufficient compliance with section 130; also the deposit receipt of the 8th of August 1912.

[The Court asks whether any stamp duty was required for the document; it could not be admitted as a cheque.]

The letter did not amount to a bill of exchange or cheque.

Submits that the learned Judge has found that Wakeford intended that Harrison should have the money after his death.

(To Court) Submits that there was no necessity to draw a cheque but to produce the receipt. Anyone who produced the receipt would get the money.

Refers to section 81, illustration (*c*) of the Trusts Act. Section 81 was entirely different from the facts of this case.

Admits that there was a trust not to touch the principal as long as the deceased was alive.

For a contract between Wakeford and the Bank there was substituted a contract between Harrison and Wakeford.

Refers to section 62 of the Contract Act.

The Bank has paid to Harrison and could not perform the contract made with Wakeford; refers to *Harding* v. *Harding*[1].

(1) (1886) 17 Q. B. D. 44.

There was complete proof of novation without the letter.

Inverarity, with *Strangman* (Advocate General), for the respondent :—

Contends that if A's money stands in B's name, B has to show how the money came to stand in his name under section 130. The defendant must show a beneficial interest in the money.

The letter was a direction to the Bank to renew the deposit in the name of Harrison. It was not a transfer certainly not an assignment. The assignment contemplated in section 130 should be in writing.

The defendant has failed to prove a gift.

That document (the letter of the 8th of August 1912) was a bill of exchange and therefore inadmissible in evidence. Refers to *Edwards* v. *Jones*[1] ; *Down* v. *Ellis*[2].

Binning, in reply, refers to sections 36 and 61 of the Stamp Act ; *Harding* v. *Harding*[3] ; section 81 of the Trusts Act ; section 123 of the Transfer of Property Act.

The plaintiff was not looking after the deceased, his client was looking after him. It is a perfectly clear case of payment by the deceased's agent to a party nominated by him. Refers to Ashburner's Equity, page 143.

Inverarity refers to *Mulraj Khatau* v *Vishwanath Prabhuram Vaidya*[4].

Contends that in India there cannot be an equitable transfer by deposit of an actionable claim. There was no equity until the instrument had been executed.

C. A. V.

(1) (1836) 1 My. & Cr. 226.
(2) (1865) 35 Beav. 578.
(3) (1886) 17 Q. B. D. 442.
(4) (1912) L. R. 40 I. A. 24

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SCOTT, C. J. :—The undisputed facts are that one Mr. Wakeford, who was in receipt of a Government pension of Rs. 54 per mensem, had a deposit of Rs. 10,500 with the Hongkong and Shanghai Bank under a deposit receipt of the 7th of August 1911 which fell due on the 7th August 1912. On the 26th June 1912 he wrote to the Bank saying the receipt had been stolen and asking for a duplicate receipt. He visited the Bank soon after and was given a form for an indemnity to the Bank on the issue of a fresh receipt. He then told the Bank clerk Sunderrao that he wanted a duplicate and wanted to give the money to his nephew, the defendant Harrison, who had accompanied him to the Bank. The defendant came to the Bank again on the 7th August with the deposit receipt, which had been found duly endorsed and a letter from Wakeford but upon being told he would have to be identified by Wakeford took away the deposit receipt and the letter. He returned the following day with the deposit receipt bearing Wakeford's endorsement, dated the 7th August, and also with a letter in the following terms :—

Bombay, 8th August 1912.

The Agent,
Hongkong and Shanghai Banking Corporation.

Sir,

I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

Yours truly,
(Signed) C. A. Wakeford

This is my nephew's signature :—

(Signed) W. C. Harrison
(Signed) C. A. Wakeford

The defendant asked for a new deposit receipt for Rs. 10,000 and the Bank issued a receipt for that sum in the defendant's name and paid him the interest due on the former receipt and Rs. 500 as the balance of the principal.

Wakeford died on the 18th October 1912 at the age of 84 unmarried and leaving him surviving as his next of kin ten grand-nephews and nieces, *viz.*, two sons and two daughters of his predeceased niece Jane Williams and three sons and three daughters of his predeceased nephew Edmund Harrison. Two days before the due date for payment by the Bank of the sum of Rs. 10,000, secured by the deposit receipt in favour of the defendant, one of the daughters of Jane Williams filed this suit claiming a declaration that she as administratrix of Wakeford was entitled to the said sum of Rs. 10,000 as part of his estate.

The plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained Letters of Administration on the 31st October 1913 a fortnight before the hearing and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefitting the defendant, for a fresh suit would immediately have been brought by the administratrix. The course which the trial

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eventually took was determined by a ruling of the learned Judge that the endorsement of the receipt by the deceased was not evidence of a gift and that the onus was on the defendant to show how what was the only property of the deceased in August came to be given to him and that if he proved facts from which the Court could deduce that there was a good gift the plaintiff would then have to prove circumstances showing the gift was invalid. On the evidence the learned Judge was satisfied that the deceased was anxious that the defendant should have the benefit of the money deposited with the Bank but did not think that he intended that the defendant should be able to make away with the money in the donor's life-time or draw the interest without making due provision for the donor's maintenance but he held that there was no effective transfer, having regard to section 130 of the Transfer of Property Act, of the debt due by the Bank to the deceased and that, if there was, there would be a resulting trust for the legal representative of the deceased under section 81 of the Indian Trusts Act.

We are unable to concur in the learned Judge's conclusion as to the effect of the transaction of the 8th of August. It is established by a preponderance of English authority that a deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual that individual becomes the owner of the money upon payment by the Banker or his promise to hold it at the disposal of the payee. The question is discussed by Buckley, J., in *In re Beaumont*[1] where he says:—"In all the cases, in order that the gift may be valid, it must I think be shewn that the

[1] [1902] 1 Ch. 889 at p. 894

donor handed over either property, or the indicia of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property". An order on a Banker to pay money which he holds to the credit of the customer is not an assignment of a debt but an authority to deliver property which if acted on is equivalent to delivery by the customer. Here the letter of the 8th of August is such an order and it has been acted on. It may be that if objection had been taken at the hearing it would have been rejected for want of a stamp. That, however, is not an objection which can be effective in appeal now that the letter is in the record (see section 36 of the Stamp Act).

The defendant is, therefore, the owner of the money secured by the existing receipt and the plaintiff cannot succeed unless she shows that he holds it in trust for the donor or his representatives. In our opinion the finding of the learned Judge as to the intention of the donor, which is as favourable to the plaintiff as the evidence permits, negatives the idea of any resulting trust. Upon that finding this is a much stronger case in favour of the donee than *Standing* v. *Bowring*[1]. The plaintiff in that case being 86 years of age and being possessed of Consols to the amount of £6,000 transferred them into the names of herself and her godson. It was proved that she was aware when she did this that she would

[1] (1885) 31 Ch. D. 282.

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be able during her life-time to receive the dividends and that if her godson survived her he would become entitled as survivor. Lindley, L. J., remarked at page 289:—"The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the Consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shews that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors: they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied".

The gift in this case was an absolute gift to the donee with the expectation that he would look after the donor till the latter's death. In our opinion the evidence shows, though this is not essential to the defendant's success, that the defendant acted up to the donor's expectations. According to Exhibit 10 (a letter of the deceased to the plaintiff in June 1911) the donor paid his rent out of the interest he then received from the Bank and presumably paid his other expenses from his monthly pension of Rs. 54. In the month following the gift the defendant took the donor to live with him and thus became responsible for his lodging.

The learned Judge at one period of the case thought that the fact that an old man of debilitated health gave all his savings to the one among his nephews and nieces who had taken charge of him raised a presumption of undue influence. We are not prepared to assent

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to this, and the evidence shows in addition that a coolness had arisen between the old man and the plaintiff whom along with her sister he had at one time intended to benefit by will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellants: *Messrs. Little & Co.*

Attorneys for the respondents: *Messrs. Pestonji, Rustomji and Kolah.*

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914.

March 24.

THE SHOP STYLED TAYABALLI GULAM HUSEIN (ORIGINAL DEFENDANTS), APPELLANTS, *v.* ATMARAM SAKHARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 268, 278, 283—Civil Procedure Code (Act V of 1908), Order XXI, Rules 58 and 63—Transfer of Property Act (IV of 1882), section 132, illustration (i)—Decree—Execution —Garnishee—Attachment of debt—Objections by Garnishee unsuccessful—Purchase by judgment-creditor—Suit by purchaser against Garnishee—Garnishee cannot raise the same defence—Suit by Garnishee, period of one year from the date of adverse order—Equity of cross debt—setting up without payment of Court fee—Garnishee's right of set-off—Prompt decision —Garnishee, trustee for the judgment-debtor.

A brought a suit against B and in execution of the decree attached a debt alleged to be due to B by T under section 268 of the Civil Procedure Code (Act XIV of 1882). T's objection to the attachment having failed A applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against T, the Garnishee, for the recovery of the debt. Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment,

* Second Appeal No. 509 of 1913.