importance of defining at the earliest moment and in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of litigation through the various Courts and upon which this Tribunal ultimately advises.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: Mr. *E. Dolgado.*

Solicitors for respondents: Messrs. *Baker, Blaker and Hawes.*

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Kanga.

FAZAL D. ALLANA (PLAINTIFF) *v.* MANGALDAS M. PAKVASA (DEFENDANT)*.

1921. *June* 30.

*Sale of shares—Share certificates—"Goods"—Delivery of blank transfers and certificates—Native Stock and Share Brokers' Association—Rules and custom—Certified brokers—*Del credere *agents—Duties—Contract—Performance induced by fraud—Effect—Indian Contract Act (IX of 1872), section 108—Estoppel.*

Share certificates are moveable property and are therefore "goods" within the meaning of section 108 of the Indian Contract Act.

Hazarimull Shohanlal v. *Satish Chandra Ghose*[1], referred to.

Delivery of the share certificates with the transfers executed in blank passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner.

Colonial Bank v. *Cady and Williams*[2], followed.

*O. C. J. Suit No. 537 of 1921.

(1) (1918) 46 Cal. 331. (2) (1890) 15 App. Cas. 267

1921.

FAZAL v. MANGALDAS.

If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated, but if the performance of the contract is obtained by fraud or cheating the contract cannot be avoided. Thus if a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to him, and if he sells and delivers the goods to a *bona fide* purchaser for valuable consideration and without notice, such a purchaser gets a good title to the goods and the original seller cannot recover the goods from such a purchaser.

Jamsetji Nassarwañji v. *Hirjibhai Naoroji*[1], referred to.

The plaintiff, who was the registered owner of nineteen shares in the Central India Mills Co., sold the said shares for January 1921 settlement, through a certified broker of the Bombay Native Stock and Shares Brokers' Association. The defendant had purchased one share in the same Company through another certified broker for the same settlement. In accordance with the rules and the custom of this Association for the delivery of the shares by the brokers on the settlement day, a *kapli*, or ticket, for the one share of the Central India Mill Co., was issued by the defendant's brokers to the broker with whom he had an outstanding contract for sale, and this *kapli* passed, in the final stage of its circulation among the brokers, into the hands of the plaintiff's broker, who retained the same and thereby undertook to deliver one share of the said Company to the defendant's broker on the settlement day. The plaintiff duly signed a transfer form as seller of one share in the said Company and it was handed over by his broker to the defendant's broker. The settlement day for delivery of shares by brokers was 17th January. On 15th January 1921, the plaintiff's broker gave the plaintiff a post-dated cheque of 20th January 1921 for the price of his nineteen shares and received from him the share certificates, though according to the usage of the market the plaintiff was bound to deliver the share certificates to his broker on or before the settlement day without receiving from him the price of the shares. On the settlement day the defendant's broker paid the price of the one share purchased to the plaintiff's broker and received from him a share certificate. On 19th January 1921, the plaintiff's broker absconded without paying the plaintiff the price of his shares. The post-dated cheque given to the plaintiff was dishonoured by the bank on which it was drawn. On 20th January 1921, the defendant as transferee of the share lodged the transfer form and the share certificate with the Company for transfer to his name. The plaintiff thereupon filed this suit against the defendant for a declaration that he was entitled to his share certificate and for consequential relief. The plaintiff contended, *inter alia*, that he dealt with his broker as principal with principal and not as principal with agent, that the contract with his broker was voidable on the ground that

(1) (1912) 37 Bom. 158.

at the time it was entered into the broker had the fraudulent intention of not paying the price of the shares and that the broker's title being bad he could not give to the defendant a better title to the share than he himself had :—

Held, that assuming that the plaintiff dealt with his broker as principal with principal and not as principal with agent, the plaintiff handed over the transfer form and the share certificate to his broker before the settlement day, in due performance of his contract and according to the custom of the market and not by reason of any fraud of the broker, and that the plaintiff's title both legal and equitable passed to the broker and the broker transmitted that title to the defendant.

Held, further, that assuming that the plaintiff was induced to deliver the share certificate on the fraudulent representation of his broker which amounted to cheating, it was the performance of the contract and not the contract itself that was obtained by fraud or cheating, and that the plaintiff's title both legal and equitable passed to the broker and the broker having passed that title to the defendant, a *bona fide* purchaser for value without notice, the latter was entitled to retain the share and to get it registered in his name in the books of the Company.

Held, further, that the plaintiff in fact dealt with his broker as principal with agent and that, as the plaintiff put forward his broker as his agent in the market to make representations to innocent third parties to the effect that the broker was authorised to transfer the plaintiff's title in the share and to receive the purchase price, the plaintiff could not be heard to say, if those representations were acted upon by innocent third parties, that his broker obtained the share certificate by cheating him.

Held, also, that, apart from any contract between the plaintiff and his broker, the plaintiff by signing a transfer form and delivering it with the share certificate to his broker, placed the latter in a position to give a title to the defendant as a *bona fide* purchaser for value without notice and was estopped from asserting any right to the share.

Dicta of Lord Watson and Lord Herschell in *Colonial Bank* v. *Cady and Williams*[1], cited and followed.

Waterhouse v. *Bank of Ireland*[2] and *Fuller* v. *Glyn, Mills, Currie & Co.*[3], referred to.

The certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents of their constituents. Their duties are

[1] (1890) 15 App. Cas. 267. [2] (1892) 29 L. R. Ir. 384
[3] [1914] 2 K. B. 168.

1921.

FAZAL v. MANGALDAS.

strictly to adhere to the position of agents, to act diligently for their principals, carry out their instructions, make enforceable bargains for them and keep those bargains open.

THE facts of the case are fully stated in the judgment of Kanga J.

Vakil, with him *Sir Thomas Strangman*, Advocate General and *Inverarity*, for the plaintiff.

Taraporewalla, with *Desai*, for the defendant.

KANGA, J.:—The plaintiff is a partner in the firm of Allana, Sons & Co. Up to 19th January 1921 Ebrahim Fazal, Boga, and Anveri were carrying on business in partnership in the old Bombay Share Market as share and stock brokers. Ebrahim Fazal was a member of the Native Stock and Share Brokers' Association and the card issued by the said Association stood in the name of Ebrahim Fazal. In October 1920 the plaintiff employed the said firm of brokers, whom I shall hereafter refer to as "the brokers" to transact share business for his firm of Allana, Sons & Co. The plaintiff in October 1920 through the brokers bought twenty-five Central India Mills shares for October 1920 settlement at Rs. 4,800 per share and sold twenty-five Central India Mills shares for Moorat (November) settlement at Rs. 4,860 per share according to the rules and regulations of the Native Stock and Share Brokers' Association for his firm of Allana, Sons & Co. The twenty-five shares bought for October settlement were for the sake of convenience transferred to the plaintiff's name in the books of the Central India Mills Co. and the firm of Allana, Sons & Co. paid to the brokers Rs. 1,20,000 being the price of the said shares.

At the time of the November settlement, plaintiff delivered five out of the said twenty-five shares and received from the brokers payment of the price at

which the said five shares were sold. At the same time the plaintiff through the brokers carried over the remaining twenty shares to the next settlement, i. e., he bought twenty shares for the Moorat (November) settlement at Rs. 4,600 and sold the same number of shares for December 1920 settlement at Rs. 4,646 according to the rules and regulations of the Share and Stock Brokers' Association (see Exhibit H).

In the month of December 1920, the plaintiff through the brokers "budlied" nineteen shares of the Central India Mills, i. e., he bought nineteen shares for December 1920 settlement and sold the same number of shares for January 1921 settlement according to the rules and regulations of the Native Stock and Share Brokers' Association.

As there was no further "budley" business done in respect of the said nineteen shares the plaintiff had to deliver the same at the time of the January settlement. 17th of January 1921 was fixed by the Native Stock and Share Brokers' Association as the payment day (i. e., the day for the payment of money in respect of shares delivered in the market) and 20th January as the Valan day, i. e., the day for the payment of differences in respect of transactions of January settlement.

Defendant No. 1, in the middle of December 1920, employed V. C. Shroff, a certified broker of the Native Stock and Share Brokers' Association, as his broker to buy for him one Central India Mills share, for January 1921 delivery. Shroff bought one share for and on account of the defendant from Shiv Narain Nemani, certified brokers, at Rs. 4,215 for January 1921 delivery. Defendant No. 1 told Shroff in December 1920 that he would take delivery of the one share bought by him. According to the rules and custom of the said Association, Shroff, who had to take delivery of one share on

1921.

FAZAL v. MANGALDAS.

the January settlement, issued on or about 6th January 1921 a *kapli* (Exhibit 4) and sent the same to Chimanlal Hiralal with whom he had an outstanding contract for one Central India Mills share. That *kapli* was circulated amongst the certified brokers between whom contracts in respect of one Central India Mills share were outstanding, and ultimately that *kapli* came into the hands of Ebrahim Fazal (the brokers). The brokers retained the *kapli* because they had to deliver one Central India Mills share and informed Shroff on or before the 11th January that they had retained the *kapli*. The brokers, before 9th January, gave the transfer forms for the said nineteen shares sold by the plaintiff for January settlement to Esmail, a cousin of the plaintiff, for the plaintiff's signature in performance of the plaintiff's transaction of December 1920. Esmail handed over the said transfer forms to the plaintiff for his signature. On the 9th January 1921 (Sunday), the plaintiff signed the said transfer forms and gave the same to Esmail for being handed over to the brokers and left for Poona. On 10th January, Esmail delivered the said transfer forms signed by the plaintiff to J. J. Trivedi, an employee of the brokers. According to the rules and usages of the said Association, the brokers delivered the transfer form for one share duly signed by the plaintiff to Shroff on the 11th January 1921. Shroff sent the said transfer form to defendant No. 1 for his signature. Defendant No. 1 signed the transfer form and returned the same to Shroff.

According to the rules and usages of the Association the brokers had to deliver the share certificate or certificates in respect of the one share to Shroff on 17th January 1921 and Shroff had to pay the price of the same to the brokers on the same day, an hour or two after the share certificates were delivered to him. The

brokers who have to deliver shares in the market on the payment day, according to the usages of the market, receive the share certificates from their constituent before the payment day and make payments to their constituents on the payment day or a day thereafter. So, on 15th January 1921, Anveri saw the plaintiff's cousin Esmail and demanded from him the share certificates.

According to the evidence of Esmail he asked for moneys when Anveri demanded from him share certificates. Account of the price was then made up. The price of nineteen shares at the rate of Rs. 4,600 per share was Rs. 87,400. The firm of Allana, Sons & Co. had given a loan to the brokers of Rs. 4,000. Balance due in respect of that loan was Rs. 2,775 and interest on Rs. 2,775 amounted to Rs. 85-6-0. The total amount was Rs. 91,134-6-0. Anveri gave a post-dated cheque (Exhibit B) for Rs. 91,134-6-0 but Esmail refused to take it. Thereupon Anveri told Esmail that he had no money then in the Bank but he would get moneys on the 18th or 19th January from the purchasers of nineteen shares and would pay the moneys into his current account with the Bank and the cheques would be honoured on the 20th January. Esmail further says that relying on the said representations of Anveri he gave to Anveri the share certificates. Esmail forgot to calculate in the account that was made up interest on the nineteen shares for one month from November 1920 to December 1920 which interest amounted to Rs. 874. So on the same day he through his servant demanded Rs. 874 from the brokers and the brokers on the same day sent to him another cheque for Rs. 874 post-dated the 20th January 1921 (Exhibit C).

On the 16th January, the plaintiff returned to Bombay from Poona and his cousin Esmail showed to him

1921.

FAZAL v. MANGALDAS.

the said post-dated cheques and informed him of what had happened on the 15th January.

On the 17th January, at about 12 o'clock, the brokers delivered share certificates in respect of two half-shares of the Central India Mills to Shroff, who compared the transfer form and the share certificates and found them in order and at 5-30 p. m. on the same day made payments to the brokers in respect of the said half shares. He had at that time the moneys of the 1st defendant in his hands. He had sold five Indore Malwa and five Currimbhoy Mill shares of defendant No. 1 in the market, and according to his evidence had received the sale proceeds of these shares before he paid the brokers. The brokers absconded on the 19th January without paying the moneys in respect of the said nineteen shares to the plaintiff. The plaintiff presented the cheques to the Central Bank on 20th January and 21st January, but the same were dishonoured. Plaintiff gave a public notice in the *Times of India* of the 21st January to the effect that the brokers had fraudulently received nineteen shares from the plaintiff and had absconded and that no one should deal with the said nineteen shares.

On the 19th or 20th January 1921, defendant No. 1 sent the transfer form and two half-shares to Shroff, asking him to get the same transferred to the name of defendant No. 1 in the company's books. Shroff lodged the transfer form and two half-shares with the company on 20th January and the company gave him a temporary receipt (Exhibit 10).

On 20th January 1921, the plaintiff wrote a letter to the Central India Spinning & Weaving Co. asking the company not to transfer the shares standing in the name of the plaintiff to the name of any person. The company by their letter, dated 22nd January 1921, stated

that the transfer deeds in respect of thirteen shares standing in the plaintiff's name had been properly executed and called upon the plaintiff to obtain an injunction restraining the company from transferring the shares. On the 25th January the plaintiff wrote to the first defendant asking him to return the two half-shares, Nos. 12234A and 12721A, which the first defendant had lodged with the company for getting the same transferred to his name.

The plaintiff in February 1921 filed this suit against defendant No. 1 and against the Central India Spinning & Weaving Co., defendant No. 2, praying that it might be declared that he was entitled to the said two half-shares and that the first defendant might be ordered to deliver to him the share certificates and the transfer forms in respect of the said half-shares.

On 3rd February 1921, the plaintiff obtained an interim injunction and by a consent order, dated 24th February 1921, the said interim injunction was dissolved on defendant No. 1 undertaking to pay the value of the shares mentioned in the plaint as of 26th January 1921 in the event of a decree being passed against him. The said consent order was without prejudice to the rights and contentions of the parties. Subsequently the shares were transferred to the name of the first defendant in the books of the company. By the said consent order it was agreed that the suit was to be decided as if the shares had not been transferred to the first defendant's name. The plaintiff also filed similar suits against the purchasers of the remaining eighteen shares. Similar consent orders were passed in the said suits also on the application of the plaintiff for an injunction against the purchasers of shares and the company. Six suits filed by the plaintiff were tried by me The parties to this suit and to the other five suits tried

1921.

FAZAL v. MANGALDAS.

by me are agreed that evidence given in all the six suits filed by the plaintiff should be treated as evidence given in each of the six suits. In the plaint as originally drafted plaintiff's case was that in December 1920 he agreed to sell nineteen shares for cash payment in January 1921 through Ebrahim Fazal, Boga and Anveri and that, according to the usage of the Bombay market, the brokers were liable to the plaintiff for the performance of the said contract. On 15th January 1921 Esmail handed over share certificates for nineteen shares to Anveri on the representations of Anveri that, on 17th or 18th of January, the brokers would receive moneys from the purchaser and that the moneys would be paid into the brokers' current account with the Bank and the post-dated cheques which Anveri gave to Esmail would be honoured. When Anveri made the said representations the brokers had no intention to make available at the Bank sufficient moneys to meet the cheques and the share certificates and transfer forms were obtained from Esmail by means of an offence and fraud and the plaintiffs were entitled to the two half-shares.

After the issues were raised counsel for the plaintiff applied for amendment of the plaint and the application was granted.

The plaintiff's case as amended is as follows :—

The plaintiff dealt with the brokers as principal with principals and not as principal with agents, that the contracts of the plaintiff with the brokers in October, November and December 1920 were voidable on the ground that the brokers had at the time of the said contracts formed the fraudulent intent of not paying for the said shares and had no intent of performing their promise to pay cash for the said shares and that the original

contracts entered into in October 1920 and the subsequent contracts in November and December 1920 were each of them voidable by the plaintiff. In the month of January the brokers had the said fraudulent intention and they had no intent of performing their promise that the cheques given by them would be cashed on presentation and that the contract then made was also voidable by the plaintiff, and further, that plaintiff was also entitled to avoid the contract under section 39 of the Indian Contract Act even if the contract or contracts to sell were not voidable *ab initio*. The brokers were the purchasers of the share from the plaintiff and the brokers dealt with the purchasers in the market (the brokers of defendant No. 1 in this suit and defendants in other suits) as principals with principals and that the brokers' title being bad, they could not give to the purchaser, defendant No. 1, a better title to the shares than they themselves had (section 108, Indian Contract Act) and that none of the Exceptions to section 108 of the Indian Contract Act applied and so the plaintiff was entitled to the half-shares in this suit and to the shares in the other suits filed by him.

It was contended on behalf of defendant No. 1 that the plaintiff dealt with the brokers as principal with agents and not as principal with principals, and that the plaintiff did not sell the shares to the brokers but sold the same in the market through the brokers and the brokers gave the share certificates in the market in performance of the contract which the brokers had entered into for and on behalf of the plaintiff, and that the plaintiff being the seller of shares the plaintiff's title to the shares was transmitted to the first defendant. It was further contended that even if the plaintiff dealt with the brokers as principal with principals and the shares were purchased by the brokers from the plaintiff, the brokers were in possession of the shares

1921.

FAZAL v. MANGALDAS.

under a valid contract with the plaintiff and the property in the shares passed to the brokers and the brokers could give a good title to the shares to defendant No. 1 who was a *bona fide* purchaser for value without notice of the two half-shares of the Central India Spinning & Weaving Co.

It was also contended on behalf of defendant No. 1 that the plaintiff, having delivered transfer forms duly signed by him and the share certificates to the brokers who handed over the same to the broker of the first defendant and received the price of the shares from the broker of the first defendant, was estopped from questioning the title of the first defendant, who was a purchaser for value without notice, to the said two half-shares.

All the three partners, Ebrahim Fazal, Boga and Anveri, absconded on 19th January 1921 and their whereabouts are not known. The cheques given by them to the plaintiff on 15th January were dishonoured. From the current account of Messrs. Boga and Anveri with the Central Bank of India (Exhibit F) it appears that from 1st January 1921 up to 19th January 1921 there was a debit balance of Rs. 11,000 against Messrs. Boga and Anveri. From the current account of Ebrahim Fazal Visram with the National Bank of India (Exhibit Q) it appears that on 31st December 1920 there was a credit balance of Rs. 8-15-2, and on 31st January 1921 a credit balance of Rs. 5-13-2. Thirty-three certified brokers of the Native Stock and Share Brokers' Association have sent in their claims against the brokers to the Secretary of the Association in respect of the share certificates delivered by them to the brokers at the time of the January settlement. According to the said claims the debts due by the brokers amount to Rupees four or five lacs. Thirty certified brokers have sent in their claims to

the said Secretary against the brokers in respect of differences due to them for the January settlement. The total amount of claim in respect of such differences is Rs. 40,000. Haji Bachu Ali, the father-in-law of Boga, says in his evidence that he had entered into large budley transactions through the brokers, and the brokers had to pay to him on the 17th or 18th January 1921 a sum of Rs. 1,89,000 in respect of budley transactions; that the brokers, on 17th January 1921, took away from him share certificates of 6,500 shares of various companies and transfer forms signed by him in respect of the said shares and the brokers gave him on 18th January 1921 twenty-three cheques all payable to Ebrahim Fazal or bearer of the value of Rs. 1,27,000 and stated that they would send to him the balance of Rs. 62,500 the next day. Out of the said twenty-three cheques, twenty-two were crossed and one was not crossed. On 19th January the one cheque that was not crossed was cashed by Aladin, an employee of Haji Bachu Ali. Haji Bachu Ali further says that as his son was not in Bombay and that as he did not know how to read or write, he gave fifteen cheques to Visram Esmail & Co. and six cheques to Mahomedali Visram. Visram, Esmail & Co. paid the said fifteen cheques into their current account with the Bank of India and gave to Haji Bachu Ali the cash amount of the fifteen cheques. Mahomedali Visram paid the said six cheques into his current account with the Central Bank of India and gave to Haji Bachu Ali the cash amount of the said six cheques. One crossed cheque was cashed by Shariff Hasham by paying the same into his account with the Imperial Bank of Persia. Haji Bachu Ali received the moneys in respect of all the said twenty-three cheques on 18th or 19th January. According to his evidence he has a claim of Rs. 62,619-5-0 against the brokers.

1921.

FAZAL v. MANGALDAS.

On the evidence before me, it is quite clear that the first defendant (and defendants in the other suits filed by the plaintiff) acted with perfect good faith and purchased the shares for value. Except where a shareholder is estopped from denying the title of some particular transferee the general rule of English law is that a purchaser of shares acquires no better title than his vendor himself has (*Colonial Bank* v. *Cady and Williams*[1]) and that shares in this respect are like other goods and chattels: see *Cole* v. *North Western Bank*[2], and Lindley on Companies, Vol. I, p. 658 (6th ed.).

The expression "goods" in section 108 of the Indian Contract Act includes all moveable property, see section 76 of the Indian Contract Act. The General Clauses Act No. I of 1868, section 2, sub-section 6, defines moveable property as meaning property of every description except immoveable property and sub-section 5 defines immoveable property as including land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It is enacted by section 28 of the Indian Companies Act that shares in a Company shall be moveable property. Share certificates are moveable property and are therefore "goods" within the meaning of section 108 of the Indian Contract Act, see ill. (*a*) to section 88 of the Indian Contract Act and *Hazarimull Shohanlal* v. *Satish Chandra Ghose*[3]. Counsel for the plaintiff as well as for the defendant admitted that Chapter VII of the Indian Contract Act applied to share certificates. Under section 108 of the Indian Contract Act no seller can give to the buyer of goods a better title than he himself has except in cases falling within the exceptions to that section.

(1) (1890) 15 App. Cas. 267. (2) (1875) L. R. 10 C. P. 354.
(3) (1918) 46 Cal. 331.

Assuming that the plaintiff dealt with the brokers as principal with principals the question is, whether the first defendant is entitled to the two half-shares mentioned in the plaint?

It was argued for the plaintiff that the Court must infer that the brokers in October, November and at all events in December 1920 conspired together to purchase a lot of shares without any intent of paying for them, and that they had, at the time they entered into the transactions with the plaintiff in October, November and December 1920, formed the fraudulent intent of not paying for the said shares and had no intention of performing their promise to pay for the said shares sold, from the following facts, namely:-

(*a*) the brokers bought a large number of shares. The plaintiff has filed eight suits against ultimate purchasers in respect of the nineteen Central India Mills shares sold to and through the brokers. The brokers had bought from others also;

(*b*) the brokers took from the plaintiff share certificates and gave to him bogus cheques on Banks where they had no credit and that they gave cheques to others also which were dishonoured;

(*c*) the debts due to other brokers from the brokers in respect of the shares delivered to them in the market amounted to four or five lacs. The debts due to other brokers from the brokers in respect of differences amounted to about Rs. 30,000;

(*d*) all the three partners, Ebrahim, Fazal, Boga and Anveri absconded;

(*e*) Exhibit F shows that between 1st January and 19th January in the current account of the brokers with the Central Bank of India, there was a debit balance of Rs. 11,000 against them.

1921.

FAZAL v. MANGALDAS.

I do not think the Court can infer any such fraudulent intent in October, November or December 1920. In October the plaintiff bought through the brokers twenty-five shares of Central India Mills for October and sold the same number of shares for Moorat (November). The brokers brought to the plaintiff twenty-five share certificates and transfer forms. The brokers must have got transferred twenty-four shares to the plaintiff's name in the books of the company in October. The plaintiff kept with him the share certificate and transfer form in respect of one share with the name of the transferee in blank. If the brokers had any such fraudulent intent as is contended for, in October, they would not have given the share certificates and transfer forms to the plaintiff. In November 1920 at the time of the Moorat settlement the plaintiff delivered five shares in the market and budlied twenty shares. The brokers paid to the plaintiff the price of the five shares delivered. In December, according to the plaintiff, the brokers told him that the purchasers of twenty-five shares were willing to budley (carry over) the transaction for January settlement and the plaintiff instructed the brokers to budley nineteen shares of the Central India Mills and accordingly the brokers bought nineteen shares for December and sold the same number of shares for January 1921. Some difference was due to the plaintiff in respect of December settlement. That was not paid to the plaintiff by the brokers then. The brokers promised to pay to the plaintiff the difference in January. There is no evidence before me that in October, November and December the brokers had not entered into *bona fide* transactions and it is too much to ask the Court to infer that, in October, November and December 1920, the brokers who were carrying on business in the share market had not the intention of paying for the shares

bought by them and of performing their promise because on 19th January they absconded with a heavy liability and gave post-dated cheques to their constituents which were dishonoured.

I hold, therefore, that the plaintiff has not proved that the brokers at the time they entered into the transactions in October, November and December 1920 formed the fraudulent intent of not paying for the shares sold by the plaintiff and had no intent of performing their promise to pay for the said shares. The result is that if the plaintiff dealt with the brokers as principals and not as agents and if the transactions of October, November and December were contracts between the plaintiff and brokers as between principal and principals as contended for by the plaintiff and not as between principal and agents, the said contracts were not voidable, as consent to the same was not caused by fraud or misrepresentation. The said contracts, in my opinion, were, when they were entered into, *bona fide* contracts.

Then it was contended for the plaintiff that in January the brokers formed the fraudulent intent of not paying for the said shares and had no intention of performing their promise that the cheques given by them would be cashed on presentation and that the contract then made was also voidable by the plaintiff. The plaintiff has given his evidence in a very straightforward manner and I accept his evidence in its entirety. Now it is clear from the evidence of the plaintiff and Esmail that on the 15th January the brokers gave to the plaintiff two cheques post-dated the 20th January 1921. Anveri told Esmail on the 15th of January that he would get moneys from the purchasers on 17th or 18th January and would pay the amount he received from the purchasers into his current account

1921.

FAZAL v. MANGALDAS.

with the Bank and so he would be able to meet the cheques. From what transpired subsequently, it might safely be inferred that when Anveri made these statements neither he nor his partners had the intention of making available at the Central Bank of India sufficient money to meet the said cheques. The said statements were false. If Anveri induced Esmail to deliver to him the said share certificates by tendering the post-dated cheques drawn on the Central Bank where he had no money and by which Bank he expected the cheque would be dishonoured, he made the plaintiff perform his part of the contract by cheating Esmail, but the question is, whether Esmail was induced by the said fraud and dishonest statements to deliver the said share certificates to Anveri?

Esmail in his evidence says that he would not have delivered the share certificates but for the representations made to him by Anveri. But both Fazal and Esmail admitted that according to the usage they were bound to deliver the share certificates before payment was made to them. Esmail in his evidence stated that he had no reason to distrust the brokers on 15th of January. He also at first stated that the plaintiff did not tell him anything about the share certificates. When asked why he demanded payment and refused to part with the share certificates without payment, he stated that the plaintiff had told him not to part with the share certificates without receiving payment and that he did not like to part with the share certificates without asking the plaintiff about it. Plaintiff says he expected Esmail to hand over the share certificates to the brokers in the regular course of business and that he was bound to deliver the share certificates before the payment day without receiving any payment from the brokers, and that if he had been in Bombay and the

brokers had asked for the share certificates he would have delivered the same to the brokers.

It seems to me, therefore, that there is no reason why Esmail should refuse to part with the share certificates without money, and when he says he demanded money when the broker asked for the share certificates, I think he believes that to be the case after the frauds of the brokers were discovered. It seems to me that the brokers, who had by that time formed the fraudulent intent of not paying for the shares, in order that there might be no suspicions against themselves, volunteered to give a post-dated cheque and when Esmail asked why the cheque was post-dated told him that the purchase money would be put into the Bank and the cheque would be honoured. I am of opinion that Esmail would have parted with the share certificates even though no cheque or money had been paid to him and no representations made to him, though now he honestly believes that he would not have done so without being paid.

I hold, therefore, that the plaintiff handed over the transfer forms and delivered the share certificates in performance of the contract of December 1920 and that Esmail was not induced to deliver the share certificates by reason of the fraudulent representation of Anveri and that the share certificates and transfer forms were not obtained from the plaintiff's cousin Esmail by means of an offence and fraud. The nineteen shares were appropriated by the plaintiff for the purpose of the contract of December 1920 with the brokers and that appropriation was assented to by Anveri who took the share certificates, and the plaintiff's title both legal and equitable in the shares passed to the brokers and the brokers transmitted their title to the shares both legal and equitable to the first defendant and the other purchasers.

1921.

FAZAL v. MANGALDAS.

But, in my opinion, the result would be the same if Esmail was induced to perform his part of the contract of December 1920 and to deliver the nineteen share certificates on the fraudulent representation of Anveri that he would get the purchase money of the nineteen shares from the purchasers in the market and would pay the amount of purchase money into his account with the Bank and the post-dated cheques would be honoured. The contract of December 1920 was valid when made. In performance of that contract the plaintiff had to deliver to the brokers and did deliver to the brokers transfer forms duly signed by him about six days before the payment day. The plaintiff had also to deliver the nineteen share certificates before the payment day (17th January). The brokers had to pay the price to the plaintiff on the payment day or on the day following the payment day. Now I assume that the brokers induced the plaintiff to perform his part of the contract by representing to him that the brokers would perform their part of the contract of 20th January, and the plaintiff performed his part of the contract because he was deceived into believing that the brokers would perform their part of the contract. If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated; but if the performance of the contract is obtained by fraud or cheating, there is no authority for saying that the contract can be avoided. It was held in *Jamsetji Nassarwanji* v. *Hirjibhai Naoroji* [1] that fraud in the performance of a contract, apart from its making, is no ground for rescission and restoration of the parties to the position in which they were before the contract was entered into. From section 108 (3) of the Indian Contract Act, it appears that if the contract is rendered voidable because it was obtained by cheating

[1] (1912) 37 Bom. 158.

or any other offence, no property passes to the buyer. But there is no authority for extending that proposition and saying that where performance of the contract is obtained by fraud or cheating, the property in the goods delivered in performance of the contract does not pass to the buyer. In my opinion, where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a *bona fide* purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser. The seller has his remedies against the buyer under the contract and can sue him for the price of goods. When goods sold have been delivered to the buyer and the price of the goods is not paid by the buyer, the seller can only sue the buyer for the price of goods except in the following cases :—

(*a*) A seller is entitled to rescind the contract and retake possession of the goods delivered to the buyer on failure of the buyer to pay price at the time fixed where it is stipulated by the contract that he should be so entitled : section 121 of the Indian Contract Act.

(*b*) Where the contract is voidable or terminable by the seller, the seller may disaffirm the contract and retake possession of the goods which have been delivered under the contract.

(*c*) The seller may also rescind the contract and retake possession of the goods where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff. In such a case if the parties are *in pari delicto* the seller cannot

1921.

FAZAL v. MANGALDAS.

rescind the contract and retake possession of the goods from the buyer.

Even in cases (*a*), (*b*) and (*c*) the seller cannot retake possession of the goods which have been delivered to the buyer under the contract where the ownership of the goods is transferred by the buyer to a third person who before the contract is rescinded buys them in good faith of the buyer who is in possession of the goods unless the circumstances which render the contract voidable amount to an offence committed by the buyer or those whom he represents: see section 108, Exception 3, Indian Contract Act.

I hold, therefore, that even if Esmail was induced to part with the share certificates on the fraudulent representations of Anveri which amounted to cheating, the plaintiff's title both legal and equitable in the shares passed to the brokers and the brokers passed their title in the two half-shares to defendant No. 1 who is entitled to retain the two half-shares.

Then it was contended that the plaintiff was entitled to avoid the contract under section 39 of the Indian Contract Act. Section 39 deals with discharge of contract by breach. The Indian law on the subject of discharge of contract by breach is contained in sections 38, 51, 53, 54 and 55 of the Indian Contract Act. Section 39 deals with the two cases in which a party to a contract before or at the time fixed for its performance (*a*) refuses to perform his promise, and (*b*) disables himself from performing his promise. In either case the promisee may put an end to the contract unless he has signified by his words or conduct his acquiescence in its continuance. Where a party to a contract refuses to perform or disables himself from performing his promise before the contractual time for performance

has arrived, the promisee may put an end to the contract and if he does so, an anticipatory breach of the contract occurs. When a party to a contract refuses to perform or disables himself from performing his promise at the time fixed for its performance, he commits a breach of the contract unless, by agreement between the parties, further time is given and the contract is kept alive. In this case the time for performance of the contract on the part of the brokers was 17th or 18th January. The plaintiff took the post-dated cheque and gave time to the brokers till 20th January. The cheques were dishonoured on 20th January and so the brokers failed to perform their part of the contract and committed a breach of the contract on 20th January 1921. If on 15th January when the brokers gave the bogus cheques they are to be deemed to have refused to perform or disabled themselves from performing their promise the refusal or inability to perform was before the contractual time had arrived and as the plaintiff did not accept the brokers' repudiation of the contract that day no anticipatory breach occurred. In my opinion, therefore, section 39 of the Indian Contract Act does not help the plaintiff.

Then it was argued on behalf of the plaintiff that the plaintiff's signature as seller in the transfer forms was not attested and the transfer deeds were not stamped at the time the plaintiff and defendant No. 1 signed the same. It was further contended that by delivery of transfer forms in blank signed by the seller and the share certificates property in the shares does not pass to the purchaser.

Section 28 of the Indian Companies Act enacts that shares shall be transferable in manner provided by the Articles of the company. Article 33 of the Articles

1921.

FAZAL v. MANGALDAS.

of Association of the Central India Mills provides that shares will be transferred by an instrument in writing. It gives a transfer form. Article 34 provides that every instrument of transfer shall be executed both by the transferor and transferee. The Articles do not require any attestation. So there is nothing in the contention that the plaintiff's signature was not attested when the plaintiff signed the transfer forms. Under the Indian Stamp Act if the transfer forms are not duly stamped, on payment of the penalty required by law the defect is cured.

It is a common practice for a seller of shares to sign an instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name or without doing so resells and hands the blank transfer to the new purchaser who again either inserts his own name as the transferee or resells and delivers the transfer still in blank to the purchaser from him and so on. Delivery of the share certificates with the transfers executed in blank does not invest the holder of the certificates and the transfer forms with the ownership of the shares in the sense that no further act is required in order to perfect his right. The transferor continues to be the shareholder recognised by the company. As pointed out by Lord Watson in *Colonial Bank* v. *Cady and Williams*,[1] delivery of the share certificates with the transfers executed in blank passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner.

In my opinion, therefore, assuming that the shares were purchased by the brokers from the plaintiff as

[3] (1890) 15 App. Cas. 267 at p. 277.

contended by the plaintiff, the first defendant is entitled to retain the shares and to fill in the blanks in the transfer forms and get the shares registered in his name in the books of the company. If I am right in holding that even if the brokers dealt with the plaintiff as principals with principal the first defendant is entitled to retain the shares and the plaintiff has no claim to the same, it is unnecessary to determine the question whether the brokers acted as the plaintiff's agents and if so whether the plaintiff is liable for the fraud of the brokers and has no claim to the shares and the question of estoppel raised by the first defendant's counsel. But as this case may go further I shall express my opinion on the above mentioned questions.

Mr. Inverarity has contended that the plaintiff dealt with the brokers as principal with principals and not as principal with agents. He further contended that the contracts of share-brokers with their constituents in Bombay are contracts on *pakki adat* terms. The incidents of a contract entered into on *pakki adat* terms are given in *Bhagwandas* v. *Kanji*.[1] No evidence has been called to show that the relations between the plaintiff and the brokers were governed by the usages of the Bombay market known as the *pakki adat* system. No attempt has been made up to now in any case between a share-broker and his constituents in these Courts to show that transactions between a share-broker and his constituents are entered into on *pakki adat* terms. The evidence clearly shows that the broker is bound to sell the shares in the market at the proper rate and cannot buy for his constituents his own shares nor sell to himself the shares of his constituents. I, therefore, hold that the contracts of the plaintiff with the brokers were not on *pakki adat* terms.

[1] (1905) 30 Bom. 205.

1921.

FAZAL v. MANGALDAS.

The next question is, whether the transactions between the plaintiff and the brokers were between principal and principals, in other words, between buyers and sellers? In the plaint as originally drafted it is stated that the plaintiff sold nineteen shares through the brokers who were carrying on business as share-brokers on the old stock exchange and that according to the usage of the Bombay Share Market the brokers were liable to the plaintiff for the performance of the contract. Ebrahim Fazal was a member of the Native Stock and Share Brokers' Association and the brokers' card stood in his name. The plaintiff has produced the contract note, dated 22nd November 1920, sent to the plaintiff by the brokers. According to the contract note Exhibit H, twenty shares were bought for Moorat (November) settlement at Rs. 4,600 and sold for December settlement at Rs. 4,646 by the brokers by plaintiff's orders and on plaintiff's account subject to the rules and regulations of the Native Stock and Share Brokers' Association. The plaintiff has admitted that all his transactions with the brokers were subject to the rules and regulations of the Native Stock and Share Brokers' Association. It is argued that as by the rules and usages of the Bombay Share Market brokers are personally liable to the brokers with whom they transact business and are also personally liable to their constituents they deal with their constituents as principals and not as agents. According to the rules and regulations of the Native Stock and Share Brokers' Association between the brokers all business is done on the footing that they are acting as principals. Brokers can enter into transactions on their own account. Brokers when they enter into transactions on behalf of a principal do not disclose the name of the principal for whom they are acting. According to the rules of the English Stock Exchange business is done between

members of the Stock Exchange on the footing that they are acting as principals but it has never been decided that a broker on the English Stock Exchange deals with his constituents as principal with principals. It does not follow that because brokers are personally liable to the brokers with whom they transact business in the market that they deal with their constituents as principals. Every agent who contracts personally though on behalf of his principal is personally liable and may be sued in his own name on the contract: see section 230 of the Indian Contract Act. Further, it appears that by the rules and usages of the Stock Exchange stock brokers are personally responsible to their clients in the event of the person with whom they have made bargains for their clients failing to carry them out. An agent, by express contract with his principal or by the usages and rules of the particular place, market or business in which he is employed, may become personally liable to the principal. Such an agent is called a *del credere* agent. Further it is in evidence that the broker is bound to sell the shares of his client in the market at the proper rate. He is not entitled to buy his client's securities from his client nor can he sell his own securities to his client without full disclosure and is bound to account for all profits made by him, in the course of agency, beyond his ordinary remuneration. Mr. Inverarity in his concluding address contended that the brokers were the plaintiff's agents to sell and buy shares but that after they had bought and sold the shares they were not agents but principals. He argued that it appeared from what happened at the time of the settlement that the brokers did not keep the contracts, which they entered into for their clients, alive and they were allowed so to do by the usage of the Stock Exchange and therefore they were not agents, but principals. Now it appears that a broker who enters into a contract

1921.

FAZAL v. MANGALDAS.

for sale of a certain number of shares of a certain company on behalf of his constituent X with broker M does enter into a contract with the same broker M for the purchase of the same number of shares in the same company on behalf of another constituent Y before the settlement day. The broker, it is contended, thereby cancels the contract of his constituent X with the broker M because at the time of the settlement the brokers who have bought and sold equal number of shares of the same company pay differences only. During each settlement there are in the ordinary course numerous dealings in the same kind of securities and on the settling day there are many brokers who have bargains to complete and some of these brokers may have both bought and sold the same securities. It would cause great delay, inconvenience and expense, if every seller had to deliver securities to his immediate purchaser and actually transfer to him and receive payment from him when both may have had other dealings in the securities and have bought from or sold to other members who also may have re-sold or re-purchased. To avoid this the following method is adopted by the brokers who are members of the Native Stock and Share Broker's Association. The brokers who have bought and sold equal number of shares in the same companies pay differences only. A broker who wants to take delivery on the settlement day, on behalf of his constituent, calls upon a broker with whom he has an outstanding contract for purchase of the shares of which he wants to take delivery even though the broker did not buy from him the shares of his particular constituent on whose behalf he wants to take delivery. The broker who has to take delivery issues a *kapli* (known as ticket on the London Stock Exchange) on the first day of the settlement month to the broker with whom he

has an outstanding contract in respect of the shares of which delivery is to be taken. On the *kapli* the purchasing broker writes the number given to him by the clerk of the Association who gives the printed form of the *kapli*. The purchasing broker also writes on the *kapli* the name of the shares, the date, his own name, and the name of the broker with whom he has an outstanding contract and to whom he passes the *kapli*. That broker sends that *kapli* to the broker who has an outstanding contract with him and so on. The *kapli* is thus circulated amongt certified brokers with whom there are outstanding contracts till it comes into the hands of the broker who has to deliver shares on behalf of his constituent. The selling broker retains the *kapli* and informs the purchasing broker about the retention of the *kapli*. Transfer forms are signed by the constituent of the selling broker a week before the payment day. The selling broker then gives the transfer forms duly signed by his constituent to the purchasing broker who sends the same to his(purchasing broker's) constituent. The transfer forms are then signed by the constituent of the purchasing broker. The constituent of the selling broker delivers to the selling broker the share certificates before the payment day or on the morning of the payment day. The selling broker gives to the purchasing broker the share certificates on the payment day. An hour or two thereafter on the same day the purchasing broker pays the selling broker for the shares according to the rate fixed by the Association. Each intermediate broker in the *kapli* pays or receives from the broker in the *kapli* with whom he has an outstanding contract the difference between the rate fixed by the Association and the rate in the contract between them as the case may be. When the transfer forms are signed by the seller and the buyer they are not stamped. The

1921.

FAZAL v. MANGALDAS.

purchasing broker, after the share certificates are received by him from the selling broker and after he makes payment, puts the requisite stamp on the shares and lodges the transfer forms and shares with the company for getting the shares transferred to the name of his constituent. The purchasing broker gets temporary receipts from the company and hands them over to the purchaser. Under this practice, the ultimate purchaser, i.e., the issuer of the *kapli* is substituted as the broker with whom the ultimate seller is to complete the transaction.

I am of opinion that certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents of their constituents. They are in a fiduciary relationship to their constituents. Their duties are strictly to adhere to the position of agents, to act diligently for their principals, to carry out the instructions of their principals, and to make enforceable bargains for them and keep those bargains open. If A, a broker, has bought from B, another broker, a certain number of shares and B has bought from A the same number of shares in the same company for a certain settlement they may on the settlement day agree to set off one bargain against the other and so save the necessity of completing both bargains.

I think on the whole that in the plaintiff's transactions for October, November, and December 1920, the brokers acted as the plaintiff's agents, and did not deal with the plaintiff as principals with principals.

The next question that arises is whether if the brokers acted as plaintiff's agents the right, legal and equitable, of the plaintiff in the shares passed to defendant No. 1 (and to defendant No. 1 in other suits) enabling him to get the shares registered in his name in the books of the company.

The plaintiff authorised the brokers to sell the shares and the brokers sold them for and on account of the plaintiff in the market. The plaintiff gave to the brokers the transfer forms and the share certificates in order that the same might be delivered by the brokers in the market. When the plaintiff delivered the transfer forms and the share certificates to the brokers he intended to part with his interest in the shares to the transferee. A broker in the Stock Exchange has authority, which arises from his employment, both to make and take payments on behalf of his principals. The brokers in this case as plaintiff's agents delivered the transfer forms and share certificates in the market and received as the plaintiff's agent the purchase money of the shares. Instead of paying the money to their principal, the plaintiff, the brokers appropriated the same to their own use. It was contended that if the brokers were plaintiff's agents they obtained the share certificates from the plaintiff by cheating, and, therefore, the first defendant acquired no title to the shares. But the principal and not the third party is responsible for the fraud of the agent. Every act done by an agent on the principal's behalf and within the scope of his actual authority is binding on the principal with respect to persons dealing with the agent in good faith. The plaintiff having put forward the brokers as his agents in the market to make representations to innocent third parties to the effect that the brokers were authorised to transfer the plaintiff's title in the shares and to receive the purchase price of the shares cannot be heard to say, if those representations have been acted on by the innocent third parties, that the brokers obtained the share certificates by cheating the plaintiff.

Lastly, I have to consider the question of estoppel. When the blank transfer forms and share certificates are delivered under a contract by a registered holder of

1921.

FAZAL v. MANGALDAS.

shares and the buyer sells the shares and delivers the blank transfer forms and shares to a *bona fide* purchaser for value, or where blank transfer forms and the share certificates are delivered by a registered holder of shares to his broker for sale in the market and the broker sells the same as the agent of the registered holder to a *bona fide* purchaser for value, the *bona fide* purchaser gets a good title to the shares and can insert his own name in the transfer form and procure himself to be registered as owner. In such cases the question of estoppel does not arise.

Mr. Taraporevalla has argued that even if there was no valid contract between the plaintiff and the brokers and even if the brokers were not acting as the plaintiff's agents, if the plaintiff signed the transfer forms and delivered the same and the share certificates to the brokers, by that act of his, he placed the brokers in a position to give a good title to defendant No. 1 who was a *bona fide* purchaser for value without notice and that the plaintiff was estopped by the said act of his from asserting any right to the shares. Mr. Inverarity for the plaintiff contended that there is no estoppel and has relied on *France* v. *Clark*[1]; *Tayler* v. *Great Indian Peninsula Railway Co.*[2]; *Hutchison* v. *The Colorado United Mining Company and Hamill*[3]; and *Fox* v. *Martin*[4].

In *France* v. *Clark*[1] the registered holder of shares deposited share certificates and blank transfers with C as security for £ 150. C deposited the certificates and the same transfers still in blank with Q as security for £ 250. It was decided that Q could only hold them as against the registered owner as security for £ 150.

(1) (1884) 26 Ch. D. 257.
(2) (1859) 4 De. G. & J. 559.
(3) (1886) 3 T. L. R. 265.
(4) (1895) 64 L. J. Ch. 473.

In *Tayler* v. *Great Indian Peninsula Railway Co.*[1] the plaintiff who was entitled to some £ 20 shares and some £ 2 shares in a company directed his broker to sell the latter. The brokers obtained forms of transfers stamped sufficiently to pass the £ 20 shares. The plaintiff executed these forms leaving the blanks to be filled in by the broker. The broker inserted the description of £ 20 shares but left the name of the transferee still in blank and sold the £ 20 shares in fraud of the registered holder. The names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. It was held that the registered holder was entitled to the shares.

In *Hutchison* v. *The Colorado United Mining Company and Hamill (Hamill* v. *Lilley)*[2] Hamill, who was the owner of shares, delivered to his son the transfer forms signed in blank and the share certificates to deliver the same to S an intending purchaser. The son borrowed moneys by pledging the share certificates and the transfer forms in blank. It was held that Hamill was entitled to the shares.

In *Fox* v. *Martin*[3] a registered holder of shares instructed a broker to sell them for him for cash and signed a blank transfer which he handed with the share certificates to the broker. The broker deposited the share certificates and the blank transfer with his banker as security for an advance to himself. It was held, following *France* v. *Clark*[4], that the banker had no title to the shares as against the registered holder of shares.

According to the articles of the company the shares in *France* v. *Clark*[4], *Tayler* v. *Great Indian Peninsula*

(1) (1859) 4 De. G. & J. 559.
(2) (1886) 3 T. L. R. 265.
(3) (1895) 64 L. J. Ch. 473.
(4) (1884) 26 Ch. D. 257.

1921.

FAZAL v. MANGALDAS.

Railway Co.[1] and *Hutchison* v. *Colorado United Mining Company*[2] were transferable only by deed. Where the constitution of the company requires transfers to be by deed transfers in blank are void and give no title to the transferee nor has the transferee any authority to fill up the blank: see *Tayler* v. *Great Indian Peninsula Railway Co.*[1].

No doubt these cases are, therefore, distinguishable from the present case where the articles of the company do not require a deed for transfer of shares but it appears from the judgments in the above-cited cases and from *Fox* v. *Martin*[3], where the articles of the company did not require a deed, that the registered holders of shares were not estopped because the receipt of the blank transfers signed by third parties affected the mortgagees and the purchasers with notice. According to these cases a person who takes from another blank transfers of shares in respect of the debts of such person is bound to look to the authority of the person to use such blank transfer forms as his own.

It may be observed that the authority of *France* v. *Clark*[4] and *Hutchison* v. *The Colorado United Mining Co. and Hamill*[2] is considerably shaken by the speeches of Lord Watson and Lord Herschell in *Colonial Bank* v. *Cady and Williams*[5]. The House of Lords in that case decided that there was no estoppel because the acts of the executors of the deceased registered owner in signing and delivering the blank transfers did not amount to an estoppel, but both Lords Watson and Herschell said that the same acts on the part of the registered owner himself would have amounted to an estoppel. Lord Watson said (p. 278):

"Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co., for safe custody,

(1) (1859) 4 De. G. & J. 559.
(2) (1886) 3 T. L. R. 265.
(3) (1895) 64 L. J. Ch. 473.
(4) (1884) 26 Ch. D. 257.
(5) (1890) 15 App. Cas. 267.

I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal".

Lord Herschell said (p. 285):

"If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them.".

At p. 286 he said:

"The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer".

These *obiter dicta* were not followed in *Fox* v. *Martin*[1] on the ground that *France* v. *Clark*[2] was not expressly overruled by the case of *Colonial Bank* v. *Cady and Williams*[3]. *France* v. *Clark*[2] was followed by Bigham J. in *Samuel Montagu and Co.* v. *Weston, Clevedon, and Portishead Light Railways Company*,[4] where a sub-mortgagee of Lloyd's bond with blank transfer from Chick & Co., who had only a limited authority to deal with the security was held not entitled to recover the amount of the bonds which were issued by the defendant company. It was observed by Bigham J. in that case that the dictum of Lord Herschell in *Colonial Bank* v. *Cady*[3] must be used in connection with the facts of that case and was not intended to conflict in any way with the decision in *France* v. *Clark*[2]. The learned Judge further observed that it might be that if a bond with a blank transfer on its back such as an American Railway Bond were

(1) (1895) 64 L. J. Ch. 473.
(2) (1884) 26 Ch. D. 257.
(3) (1890) 15 App. Cas. 267.
(4) (1903) 19 T. L. R. 272.

1921.

FAZAL v. MANGALDAS.

handed to any one with the transfer executed by the owner, the owner would be estopped from denying the authority of the person so entrusted to deal with it but that would only be because of the inference in favour of such an authority which would be drawn from the deposit of bonds in that particular form.

The dicta of Lords Watson and Herschell were followed in the Irish case of *Waterhouse* v. *Bank of Ireland*[1], where some Pennsylvania Rail Road Company shares were handed by the plaintiffs, who were the registered owners, to a broker as margin to cover a loan with which the broker was to purchase shares in certain other companies for the plaintiffs. The broker pledged the shares for his general loan account at his bankers. He did not purchase any share for the plaintiffs but sent the contract notes purporting to have done so. The broker absconded and the plaintiffs gave notice to the bankers that they were the owners of the shares. Thereafter the bankers having filled up the transfers were duly registered in the books of the company. The bankers claimed to hold the shares as security for the amount advanced by them to the broker. It was held that the plaintiffs, having delivered to the brokers share certificates with transfer forms signed by them, were estopped from asserting their ownership against the defendants who had taken them *bona fide* for value without notice.

The abovementioned *obiter dicta* were also followed by Pickford J., now Lord Sterndale M. R., in *Fuller* v. *Glyn, Mills, Currie & Co.*[2] where the owner of shares after purchasing them through a broker allowed the certificates, on which were endorsed forms of transfer which were executed by the registered holder of shares, to remain in the hands of the broker and the broker

(1) (1892) 29 L. R. Ir. 384. (2) [1914] 2. K. B. 168.

deposited the same with his bankers, as security for his account with the bankers, it was held that the owner was estopped from setting up his title against the bankers. See also *Hone v. Boyle*[1] and the observations of Fitz Gibbon L. J. at p. 173.

The *obiter dicta* of Lords Watson and Herschell are, in my opinion, at variance with *France* v. *Clark*[2]. Brokers or bankers dealing with brokers are not put upon enquiry by the mere fact that the share certificates and transfer forms are not in the names of the brokers bringing them but are in the names of third parties. According to English law, where the owner of shares either signs the transfer forms and delivers the same with the certificates to a broker or where never having had possession of the blank transfer forms and share certificates but knowing them to be in such condition that a broker can deal with them he allows them to remain in the broker's possession and thereby enables the broker to part with them to another who takes them upon the faith of the apparent authority of the broker to deal with them, then the true owner is estopped from questioning the title of the person taking upon the faith of the apparent authority of the broker to deal with them.

The law of estoppel is contained in section 115 of Indian Evidence Act which is in these terms :—

> " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

It was laid down by their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder*

(1) (1891) 27 L. R. Ir. 137.

(2) (1884) 26 Ch. D. 257.

1921.

FAZAL v. MANGALDAS.

Laha[1] that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

I have held that the plaintiff delivered the transfer forms and share certificates to the broker.

In my opinion, even if there was no contract between the plaintiff and the brokers and even if the brokers were not transmitting the plaintiff's title to the shares as the plaintiff's agents, the plaintiff, by signing the transfer forms and delivering the same and the share certificates to the brokers, placed them in a position to give a title to defendant No. 1, who was a *bona fide* purchaser for value without notice, and is estopped by his act from asserting any right to the shares. The result is that this suit and the other suits filed by the plaintiff will be dismissed with costs.

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

Solicitors for the defendant: Messrs. *Merwanji, Kola & Co.*

Suit dismissed.

G. G. N.

[1] (1892) 20 Cal. 296, P. C.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1921. *October* 1.

JAFFERJI IBRAHIMJI, PLAINTIFF AND APPLICANT *v.* MIYADIN MANGAL AND OTHERS, DEFENDANT AND OPPONENTS*.

Civil Procedure Code (Act V of 1908), Order XXI, Rules 97, 99—Execution of decree—Obstruction by sub-tenant of judgment-debtor—Landlord and tenant—Whether sub-tenant can plead protection of the Bombay Rent Act (II of 1918), against original landlord.

* O. C. J.: Application in execution in Suit No. 1427 of 1920.