[HIGH COURT OF AUSTRALIA.]

ROSENHAIN AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

THE COMMONWEALTH BANK OF AUSTRALIA . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 22, 23; *Oct.* 11.

Knox C.J., Gavan Duffy and Starke J.J.

Bill of Exchange—Interest—"Sum certain in money"—Interest until arrival of payment in London—Custom—Unconditional order to pay—"Documents against acceptance"—Bills of Exchange Act 1909 (*No.* 27 *of* 1909), *secs.* 8, 14, 62.

Sec. 8 (1) of the *Bills of Exchange Act* 1909 provides that "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer." Sec. 14 (1) provides that "The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—(*a*) with interest," &c.

A document purporting to be a bill of exchange drawn by a company in the United States of America upon the defendants in Melbourne was in the following terms: "Sixty days after sight pay to the order of" the company a specified sum of money "with interest at the rate of 8 per cent. per annum until arrival of payment in London to cover."

Held, that the document was not a bill of exchange within the meaning of the *Bills of Exchange Act* 1909, since the document was not an order in writing requiring a sum certain in money to be paid at a fixed or determinable future time.

Held, also, that the evidence did not establish a custom that, where a document purporting to be a bill of exchange contained a similar provision for

payment of interest, the acceptor should pay on the due date the specified amount and interest thereon until the due date and also interest for a period arrived at by adding 35 days to the period between such date and the then advertised date of departure of the next following English mail.

Quære, whether the fact that the words "documents against acceptance" were upon the document prevented it from being an unconditional order to pay money.

Decision of the Supreme Court of Victoria (*Schutt* J.): *Commonwealth Bank of Australia* v. *Rosenhain & Co.*, (1922) V.L.R. 155; 43 A.L.T., 165, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the Commonwealth Bank of Australia against Kurt Victor Rosenhain and Rio Olaf Rosenhain, trading as Rosenhain & Co., being instituted by a writ upon which a statement of claim was indorsed pursuant to the provisions of the *Instruments Act* 1915 (Vict.). By the statement of claim it was alleged that the plaintiff claimed from the defendants £1,565 15s. 7d. being principal and interest due to the plaintiff as the indorsee of a bill of exchange. The defendants obtained leave to enter a conditional appearance to the action. They then entered a conditional appearance without prejudice to an application by them to set aside the writ of summons and the service thereof. They thereupon moved before *Schutt* J. to set aside the writ of summons and the service thereof on the ground that the action was not one upon a bill of exchange; but that motion was dismissed with costs: *Commonwealth Bank of Australia* v. *Rosenhain & Co.* (1).

From the decision of *Schutt* J. the defendants now, by leave, appealed to the High Court.

The instrument upon which the action was brought is substantially set out in the judgment hereunder, where the other material facts also appear.

Walker (with him *Hudson*), for the appellants. The words "documents against acceptance" are a part of the document, and they are a direction to the drawee that he is not to accept unless he receives the documents at the time he accepts (*Lister* v. *Schulte* (2)). Their effect is to make the order to pay conditional; and therefore the

(1) (1922) V.L.R., 155; 43 A.L.T., 165.

(2) (1915) V.L.R., 374; 37 A.L.T., 68.

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document is not an unconditional order to pay and is not a bill of exchange within sec. 8 of the *Bills of Exchange Act* 1909 (see *Guaranty Trust Co. of New York* v. *Grotrian* (1)).

[KNOX C.J. referred to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2) ; *Brown, Shipley & Co.* v. *Kough* (3) ; *Costelo* v. *Crowell* (4).]

In *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2) the promise to pay was on the face of the document unconditional. The sum which the drawee is directed to pay is not a " sum certain in money " within the meaning of sec. 8. Part of the interest is not interest within the meaning of sec. 14 ; for interest there connotes a principal debt owing, and here part of the interest is a payment to compensate the drawer for delay in obtaining the money which the drawee has already paid. As to the interest as a whole, the amount of it cannot be known until it is known on what date the payment arrives in London, and in order that it should fall within sec. 14 it must be capable of ascertainment at the date the instrument is drawn (see *Warrington* v. *Early* (5) ; *Standard Bank of Canada* v. *Wildey* (6) ; *Halsbury's Laws of England*, vol. II., p. 468 (*t*)). The words in the document as to interest are plain and unambiguous, and a custom cannot be inconsistent with that meaning. The evidence does not prove a custom controlling their meaning.

Latham K.C. (with him *Magennis*), for the respondent. The order to pay is unconditional within the meaning of sec. 8. Whatever the words " documents against acceptance " mean, their effect is exhausted on acceptance. Those words are an intimation that the document is part of a commercial transaction, and that the documents will be handed to the drawee when he accepts. They identify the transaction giving rise to the document (*Guaranty Trust Co. of New York* v. *Hannay & Co.* (7)). Even if the drawee had not authority to accept the bill unless at the same time he received the document, that would not affect the validity of the accepted bill in the hands of a third party as an unconditional promise to pay. The

(1) (1902) 114 Fed. Rep., 433.
(2) (1918) 2 K.B., 623.
(3) (1884) 29 Ch., 848.
(4) (1879) 127 Mass., 293 ; 34 Am. Rep., 367.
(5) (1853) 2 El. & Bl., 763.
(6) (1919) 19 S.R. (N.S.W.), 384.
(7) (1918) 2 K.B., at p. 656.

document is not any the less a bill of exchange by reason of the provision as to interest. Sec. 14 would be unnecessary if the interest were so stated as to amount to a sum certain, and is only required for a case where there is an element of uncertainty as to the amount of interest. The effect of sec. 14 is that, if the amount ultimately to be paid is uncertain by reason only of the fact that it is to be paid with interest, that fact will not prevent the instrument from being a bill of exchange. The evidence establishes the custom that where there is such a provision as to interest the acceptor pays on the due date the amount and interest until that date and also interest for a period ascertained by adding 35 days to the period between the due date and the then advertised date of departure of the next English mail. If that custom exists, then at the date of acceptance the sum was certain; for it was capable of being ascertained. The whole of the interest is properly so called; for interest is a percentage payment on a capital sum of money for a certain period, and it does not matter that portion of that period is after the payment has been made. The provision as to interest is not plain and unambiguous and the custom makes it intelligible.

Cur. adv. vult.

Oct. 11.

THE COURT delivered the following written judgment:—

The *Instruments Act* 1915 of Victoria, secs. 91-101, provides a summary proceeding for actions upon bills of exchange, cheques or promissory notes. Under these provisions the Commonwealth Bank brought an action against the appellants upon a document, drawn by Caravel Company Incorporated in New York upon the appellants Rosenhain & Co. in Melbourne, substantially in the following terms:—"Documents against acceptance—New York, December 30, 1920.—Sixty days after sight . . . pay to the order of Caravel Company Incorporated one thousand four hundred and seventy-one pounds ten shillings and sevenpence (sterling), value received, with interest at the rate of 8 per cent. per annum until arrival of payment in London to cover, and charge same to account of—Caravel Company Inc., Henry Bront, Asst. Treasurer.—To Rosenhain & Co., 563 Bourke Street, Melbourne,

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Australia.—Thru London Joint City and Midland Bank." The words "Documents against acceptance" were typewritten at the top of the document outside a marginal black line which surrounded the other writing upon it. The document was indorsed in blank by the Caravel Company Incorporated, and ultimately by various indorsements to the Commonwealth Bank. The document was presented to Rosenhain & Co., who wrote across its face: "Sighted 28/2/21 and accepted payable at the Royal Bank of Australia Ltd. Melbourne as £1,471 10s. 7d. plus interest at 8 per cent. per annum." It was at a later date presented for payment, but was not paid. The Bank subsequently, on 17th October 1921, issued its writ under the *Instruments Act*, as already mentioned, and claimed against the appellants £1,565 15s. 7d. as the indorsee of a bill of exchange. Particulars were supplied as follows:—Principal —£1,471 10s. 7d.; interest on £1,471 10s. 7d. at 8 per cent. per annum from 30th December 1920 to 10th June 1921 (date of arrival of payment in London to cover on bill maturing 2nd May 1921) 162 days—£52 5s. 5d.; interest on £1,471 10s. 7d. at 8 per cent. per annum from 11th June 1921 to 17th October 1921, 129 days—£41 12s. 1d.; notarial expenses—7s. 6d.: Total—£1,565 15s. 7d. But subsequently an affidavit filed on behalf of the Bank stated that the claim for interest to 10th June was an error in calculation, and was three days in excess of what was said to be the customary period. The appellants obtained leave to enter a conditional appearance in and to defend the action. An appearance was entered by the defendants in the action without prejudice to an application on their part to set aside the writ and the service thereof, upon the ground that the action commenced by the writ was not an action upon a bill of exchange within the meaning of the *Instruments Act*. *Schutt* J. heard the motion but dismissed it; and from this dismissal an appeal has been brought, by leave, to this Court.

The matter which requires decision is of no little commercial importance, for it turns upon the question whether the document on which the Bank founds its claim is or is not a bill of exchange. If it is, the Bank must, it is admitted, succeed; if it is not, the Bank cannot succeed, and the appellants will be in a position to

force an investigation of the accounts and cross-claims between them and the Caravel Company Incorporated.

Now, the term "bill of exchange" is defined, both in the *Instruments Act* and in the *Bills of Exchange Act* 1909 in the same words as are contained in the *Bills of Exchange Act* 1882 of Great Britain: —"A bill of exchange is an unconditional order in writing addressed by one person to another signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time *a sum certain in money* to or to the order of a specified person or to bearer." "The sum payable by a bill is a sum certain . . . although it is required to be paid . . . with interest" (see *Instruments Act* 1915 (Vict.), secs. 4, 10; *Bills of Exchange Act* 1909, secs. 8, 14).

The distinction between interest recoverable under the contract and as part of the debt and interest recoverable as damages must be borne in mind. The Bills of Exchange Acts themselves recognize the distinction (see *Instruments Act* (Vict.), sec. 10; *Bills of Exchange Act*, secs. 14 (3), 62). Clearly the interest dealt with in sec. 10 of the *Instruments Act* and in sec. 14 of the *Bills of Exchange Act* is that required by the contract to be paid. Clearly also these sections are dealing with the certainty of the sum payable. So far as that sum is concerned, certainty is not destroyed because a definite rate of interest is not specified. The same conclusion seems to have been reached before the Act (see *Warrington* v. *Early* (1)), possibly because the promise implied by the law was to pay a reasonable rate of interest, understood, in England at all events, from usage or the custom of merchants, or because of the usury laws or the practice of the Courts, as £5 per centum (see *Byles on Bills*, 15th ed., p. 444; *Chalmers on Bills of Exchange*, 8th ed., p. 30; *Halsbury's Laws of England*, vol. II., p. 468).

The "sum certain" must, however, if the document is to constitute a bill of exchange, be payable on demand, or at a fixed or determinable future time. "Certainty," as *Ashhurst* J. said in *Carlos* v. *Fancourt* (2), "is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable." Now, the document under consideration did

(1) (1853) 2 El. & Bl., 763.

(2) (1794) 5 T.R., 482, at p. 486.

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not fix a "determinable future time" for payment of the sums mentioned therein, but a fixed time, namely, "sixty days after sight." Consequently the sum must be certain at this fixed time if it is to conform to the provisions of the Bills of Exchange Acts. But clearly the sum was not certain on that date, nor could it be made certain from anything appearing on the face of the document; for interest was to run on from the time fixed for payment, namely, "sixty days after sight" "until arrival of payment in London," and it was quite uncertain, both on the face of the document and in fact, when this event would happen, or indeed whether it would happen at all.

If it be suggested that the document was payable "at a determinable future time," the uncertain contingency on which it became payable can be demonstrated from decided cases. Thus a document expressed to be payable "thirty days after the arrival of the ship *Paragon* at Calcutta" or "ninety days after sight or when realized" could not be supported as a bill of exchange, for it is quite indefinite "when these uncertain events would probably be reduced to a certainty" (*Palmer* v. *Pratt* (1); *Alexander* v. *Thomas* (2)).

Another contention made for the appellants was that the document sued upon was not an unconditional order to pay money because it was conditional upon documents being handed over on acceptance. It is not necessary, having regard to what has been said, to determine what is the legal effect of the words "documents against acceptance" at the top of the document sued upon, and perhaps all the surrounding facts are not available for a proper determination of the question. They may be a direction to the banker who presents the document or a direction to or part of the terms of the transaction with Rosenhain & Co. But, whatever their effect may be, "it does not follow, because the drawee is not bound to accept unless a condition is fulfilled, that, when he has accepted, his transferable or negotiable promise to pay is not unconditional. It turns on the terms of his promise to pay" (*Guaranty Trust Co. of New York* v. *Hannay & Co.* (3), per *Scrutton* L.J.). And with the citation of this valuable opinion we may leave the point for further consideration in a case where it actually falls for decision.

(1) (1824) 2 Bing., 185.
(2) (1851) 16 Q.B., 333.
(3) (1918) 2 K.B., at p. 666.

Turning now to the ground upon which the learned Judge below decided the case. He said:—"The words used in this document should be construed as meaning that interest is to be paid, at the rate specified, until the date when the bill falls due and for a further period arrived at by adding the usual period of carriage, which appears to be 35 days, to the period between the due date and the date of departure of the English mail next after the due date. . . . The usual practice in Melbourne seems to be in accordance with this view, and is, I think, based upon a proper interpretation of the words used." Under the ordinary canons of construction, the Court, "when once it is in possession of the circumstances surrounding the contract," should construe it according to its plain ordinary and popular meaning—its natural and literal meaning—unless there be some business custom or usage controlling or explaining the natural meaning of the words (see *Cairns* L.C. in *Bowes* v. *Shand* (1)). A custom or usage of trade may no doubt be proved to attach unexpressed incidents to the contract, or to show that "words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that" (*Brown* v. *Byrne* (2)). "In such cases the evidence neither adds to, nor qualifies nor contradicts the written contract; it only ascertains it, by expounding the language" (*Brown* v. *Byrne* (3)). The custom or usage must not, however, be inconsistent with or repugnant to the expressed terms of the contract (*Palgrave, Brown & Son Ltd.* v. *Owners of S.S. Turid* (4)). Nor can a custom or usage prevail against the provisions of a statute. Now, if *Schutt* J. intended to say that the plain, natural and literal meaning of the words in the document sued upon relating to interest is that which he assigns to them, we are unable to agree with him. The words are "pay . . . one thousand four hundred and seventy-one pounds ten shillings and sevenpence (sterling) . . . with interest at the rate of 8 per cent. per annum until arrival of payment in London." They are plain and perfectly clear in meaning. Actual arrival is stipulated for, and there is nothing in the terms used to suggest, directly or indirectly, even a

(1) (1877) 2 App. Cas., 455, at pp. 464, 468-469.
(2) (1854) 3 El. & Bl., 701, at p. 716.
(3) (1854) 3 El. & Bl., at p. 716.
(4) (1922) 1 A.C., 397.

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usual period of carriage, much less a definite period of 35 days. But from the argument before us we gather that the learned Judge rather intended to say that the words of the document were controlled or explained by a business usage, which he found, on the facts proved before him, to have been established. All these facts were proved by affidavit, and we are in as good a position to weigh them as was the learned Judge himself. It is therefore our duty to give effect to our own independent judgment upon them.

On the one side it was sworn by bank officers of repute that, in the case of documents, such as the one in question here, providing for payment of a given amount together with interest "until arrival of payment in London," there was a recognized custom that the acceptor pays on the due date the amount and interest until the due date, and also interest for a period arrived at by adding 35 days to the period between such date and the then advertised date of departure of the English mail next after the due date of the bill. And apparently the number of days differed according to the country to which the payment was to be remitted. On the other side, it was sworn by bank officers of equal repute that the form of words adopted in the document sued upon had caused difficulties and proved embarrassing to bankers; and, in collecting moneys under such documents, bankers, instead of awaiting the arrival of moneys in London and charging interest up to the date of such arrival, had, in order to avoid such difficulties and embarrassment, ascertained as nearly as possible the date when the outgoing mail to London next after the date appearing on the face of the document would arrive in London, and demanded interest until such date. The evidence on each side is probably an honest inference drawn from the practice actually followed, but as an interpretation of the facts the latter explanation is to be preferred to the former: it is a practical and probably a satisfactory method of estimating the probable amount of interest that would become payable under the document. Such a practice does not prove that the words are used in a sense different from their natural signification, but rather emphasizes that natural signification. If we thought that the facts deposed to in the affidavits supplied any foundation for the conclusion that the words used in the document before us had a customary meaning

quoad hoc (*Bruner* v. *Moore* (1)), then we should have thought it desirable in the present case, to consider whether the *Bills of Exchange Act* (apart from the special provisions of sec. 14) does not require that the sum certain in money be stated or indicated upon the face of the document itself, and also whether the custom or usage relied upon is not inconsistent with and repugnant to the terms of the contract between the parties. But as the evidence stands we think that these important matters should only be decided in a case which calls for their decision.

The appeal must be allowed.

Appeal allowed. Order appealed from reversed and set aside. The writ of summons in the action and the service thereof set aside. The plaintiff to pay the costs of the action and of the motion to set aside the writ and the service thereof and of this appeal.

Solicitor for the appellants, *Arthur Phillips.*

Solicitors for the respondent, *Weigall & Crowther.*

B. L.

(1) (1904) 1 Ch., 305, at p. 310.