

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Charles
Sefton Guthrie and Sophia his Wife v. Frederick
George Lister, from the High Court of Judicature
at Calcutta; delivered 17th November, 1866.*

Present:

LORD WESTBURY.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

We think there was no necessity for any of the observations which have been made in the Court below, touching the evidence given by General Lister. It appears to us that the account given of the transaction is reasonably consistent and clear from the beginning to the end.

It appears that Mr. Henry Inglis, the son-in-law of General Lister, was engaged in trade; that the trade was lucrative; and that he applied to General Lister to advance him money, to be employed by him in that trade. General Lister assented, and lent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to 41,900 rupees, the other amounting to 19,500 rupees. On the occasion of these advances two promissory notes were given by his son-in-law to General Lister, and in both those notes (because, although one only is produced, it has been admitted at the bar that there was another, and that the other must be taken to have been of the same tenor with that which is produced), there is a promise by the borrower, Mr. Inglis, to repay the money borrowed with in-

terest at 5 per cent., at the expiration of three years. The contention now on the part of the General, the lender of the money, is that he is entitled to interest at the rate of 8 per cent.; that his interest is not to be limited to 5 per cent., which is the prescribed rate of interest on the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forebore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But unless some such case can be proved, a claim of interest at 8 per cent. founded upon a bare promise of the debtor to pay 8 per cent. or upon the fact that the debtor has in account voluntarily debited himself with 8 per cent. in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum*.

It is satisfactory to find that the history of the introduction of the 8 per cent. into the dealings between the parties is very clearly given by General Lister himself; and it is a history which is very creditable to his son-in-law, Mr. Inglis, but which is inconsistent with the General's founding upon the circumstances any legal claim. We prefer to the allegations now made in the Plaint,—we prefer to take the letter of General Lister addressed to his daughter after the death of her husband, in which he gives her a narrative of the transaction between himself and his son-in-law; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i.e.* the legally demandable rate of interest, should be 5 per cent., but that on the occasion of the loan being made, the son-in-law of his own accord said, "I shall pay you 8 per cent. interest, because I shall be able to make more than three times that rate by the employment of the money in trade."

It is plain that these words were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law subsequently, some time after the notes had been made, when the son-in-law rendered a written account, in which he had charged himself with 8 per cent. The General's words amount to this:—"I pointed out to Mr. Inglis that he was charging himself with 8 per cent. interest, whereas I was entitled only to 5 per cent.;" but the son-in-law said, "It is all right, I can make more than three times that amount by the use of your money, therefore I desire to pay you 8 per cent." That conversation, again, is a clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son-in-law for only 5 per cent. It is in perfect harmony with the account given in the letter that the engagement originally was for 5 per cent., but that the son-in-law said, "He could afford to pay more;" and the General answered, "You can do as you please about it." It was left, therefore, to the *arbitrium* of the son-in-law, if he chose to pay 8 per cent., to pay that amount; but the legal relation which was created, was an engagement to pay 5 per cent. only.

What was done subsequently is not inconsistent with that. We have the fact, that subsequently to the date of the promissory note, on several occasions the son-in-law rendered to his father-in-law accounts current, in which he debited himself with 8 per cent. instead of 5 per cent., and that he continued that practice down almost to his death; for in one of his repositories after his death his widow found three accounts or written papers, in which also he had debited himself with 8 per cent. If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the 8 per cent., the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay 8 per cent., or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with

and a new contract substituted, for the reason we have already given, viz. that the General admits that when he saw the first account with interest at 8 per cent., he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to 8 per cent. existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts, because he had them in his possession, the General writes to his daughter the letter to which we have referred explaining how it had arisen, giving, as we have already observed, a history of the introduction of the 8 per cent., that it was a voluntary offer by his son-in-law, and that the General did not fasten it upon him and make it part of the contract, but said to his son-in-law, "You shall be at liberty to do as you please about it."

The result of the whole, therefore, seems to be plainly this, that so far as the legal right is concerned, there is but one contract existing for valuable consideration and capable of being enforced, viz. the contract made at the time of the loan, in conformity with the written obligation for the loan contained in the promissory notes; that all departures from that in respect of interest are departures which have been made from mere goodwill and sense of duty on the part of the son-in-law, who is the debtor, but not as being the result of any legal contract or obligation between him and his father-in-law.

There is no trace that the father-in-law ever treated the matter, up to the time of making the demand, as one which entitled him as a matter of right to interest at 8 per cent.; he always treats it as a matter of bounty and favour on the part of his son-in-law; and he tells his daughter he left his son-in-law at liberty to do as he pleased about it.

We regret that the demand has now been made. It appears that when the interest is reduced to the legal rate, the sum paid by the present Appellant was more than would satisfy the whole demand of the General according to his just right, and the action, therefore, was brought when there was nothing due on the part of the Appellant. The consequence must be that the decree of the Court

below must be reversed, and the *Plaint* dismissed, and the costs of the proceedings below and of this appeal must be borne by the Respondent, General Lister.

We will make our report and humbly advise Her Majesty accordingly.

