handed over to him; he will also be entitled, in the event of the defendant Punambhai Patel refusing or failing to sign a form of discharge in accordance with s. 69[1] of the Land (Transfer & Registration) Ordinance, 1933, to an Order under s. 181[2] of the Ordinance, directing the Registrar to register a discharge of the mortgage.

I hold that as against the defendant Badal the plaintiff is entitled to judgment in action 74 of 1940 for £285 14s. 8d. and interest thereon. The sum of £6 0s. 0d. lent to the defendant, Badal, by the plaintiff appears to be a separate transaction as between Badal and the plaintiff personally, and must be so treated.

The Crop Lien dated 16th July 1940 is expressed to be collateral with the mortgage, and it must therefore be held to have been given in substitution for the original Crop Lien 36/719 of the 30th June, 1936. There is thus no ground for declaring it to be void: but, on the other hand, there does not appear to be any authority for ordering that it be delivered to the plaintiff.

On the authority of *re Patrick, Bills v. Tatham* [1891] 1 Ch. 82, the defendant Punambhai Patel will be a debtor to the plaintiff in respect of any sum he may receive under this Crop Lien ; and the Court will make an order restraining Punambhai Patel from transferring, dealing with or disposing of the Crop Lien, or the proceeds of any crops secured thereunder, to or in favour of any person other than the plaintiff as trustee for Dahi.

GIWAR SINGH & OR. *ats.* BIRBAL.

[Appella+ Jurisdiction (Corrie, C.J.) April 20, 1943.]

Bill of Sale expressly collateral to two Promissory Notes—difference in terms between Bill of Sale and Promissory Notes—action on one Promissiory Note—Summary Procedure Rules 1916*—Rule* 22[3]*—one debt Sale is void—whether the debt under the Promissory Note is merged in the debt under the covenant of the Bill of Sale—memorandum in form of account stated endorsed on one copy of Bill of Sale—whether memorandum operates as a novation to extinguish promisee's rights under the Promissory Note—Summary Procedure Rules* 1916*—Rule* 22[3]*—one debt but several securities— separate causes of action —whether wrongful division of cause of action to sue on one security.*

This was an action to recover the amount due under a Promissory Note made on 19th October 1935 securing the sum of £35 5s. 0d. and and interest payable on 19th October, 1936. The Appellants were promisors and the Respondent the promisee. At the date of execution of the Promissory Note on which the claim was based, the Appellant signed another Promissory Note in favour of the Respondent for the sum of £20 0s. 0d. and interest, and also a Bill of Sale to secure the sum of

[1] *Now Land (Transfer and Registration) Ordinance Cap.* 120 *s.* 70 (*Revised Edition Vol. II page* 1236).
[2] *Now Land (Transfer and Registration) Ordinance Cap.* 120 *s.* 182 (*Revised Edition Vol. II page* 1266).
[3] *Rep. Vide Magistrates' Court Rules,* 1945, *O. IV r.* 12.

£55 5s. od. and interest. The Bill of Sale contained a covenant to repay £55 5s. od. on or before 28th October 1937—i.e. about twelve months later than the date when the Note fell due. The Bill of Sale incorporated Clause 3 of the Clauses for selection—expressly securing the same moneys as were secured by the Promissory Notes—and copies of the two Promissory Notes were annexed to the Bill of Sale. On 10th July 1939 the parties signed a memorandum endorsed on a copy of the Bill of Sale; this was in the form of an account stated to the effect that the total amount then due under the Promissory Notes and Bill of Sale was £104 15s. 11d. The Respondent obtained judgment against the Appellants for the sum of £42 14s. od. in an action based on the first mentioned Promissory Note and the Appellants appealed.

HELD.—(1) The rights powers and remedies of the Promisee under a Promissory note are not lost by a merger in his rights powers and remedies, if any, under a collateral Bill of Sale where there is a clear agreement betwen the parties to the contrary.

(2) Where part of a debt is secured by a security giving rise to a separate cause of action and such part is an amount such that the action is within the jurisdiction of a Magistrate's Court it is not a wrongful division of a cause of action to sue on that security in the Magistrate's Court, notwithstanding that the total debt is outside such jurisdiction.

(3) An "account stated" subsequently endorsed on a security and signed by the parties does not operate as a novation.

(4) The covenant to pay in a Bill of Sale may be valid though the Bill is void as against chattels

Quære.—Whether the covenant for repayment in a Bill of Sale is invalidated by a stipulation contained in a collateral Promissory Note that repayment be at a date different from that provided in the covenant of the Bill of Sale.

Cases referred to:—

(1) *Monetary Advance Co. v. Cater* [1888] 20 Q.B.D. 785; 57 L.J. Q.B. 463; 59 L.T. 311; 4 T.L.R. 464; 7 Dig. 78.

(2) *Davies v. Rees* [1886] 17 Q.B.D. 408; 55 L.J.Q.B. 363; 54 L.T. 813; 2 T.L.R. 633; 7 Dig. 126.

(3) *Commissioner of Stamps v. Hope* [1891] A.C. 476

(4) *Price v. Moult* [1851] 10 C.B. 561; 20 L.J.C.P. 102; 138 E.R. 222; 7 Dig. 192.

(5) *Twopenny v. Young* [1824] 3 B. & C. 208; 107 E.R. 711; 6 Dig. 388.

APPEAL against judgment for the Plaintiff in an action founded on a Promissory Note. The facts are fully set out in the judgment.

P. Rice, for the Appellants.

S. B. Patel, for the Respondent.

CORRIE, C. J.—This is an appeal from a judgment given on the 8th July, 1940 by the Commissioner's Court at Lautoka in an action by the present respondent, Birbal, against the present appellants, Giwar Singh and Bhagelu, for a sum of £24 14s. od.

The claim is based upon a promissory note numbered 17048 made on the 29th October, 1935, by the appellants in favour of the respondent and payable on the 19th October 1936, securing a sum of £35 5s. od. and interest at 18% per annum. In the section which gives rise to this appeal, the respondent claimed interest for 10 months at 8% only.

On the 29th October 1935, the appellants signed another promissory note numbered 53353 in favour of the respondent for a sum of £20 and interest at 18%: and upon the same day they executed in his favour a Bill of Sale over certain chattels to secure £55 5s. od. and interest at 18% per annum. The Bill contained a covenant by the appellants to pay the respondent the said sum of £55 5s. od. on or before the 28th October, 1937.

Clause 3 of the Clauses for Selection which was incorporated in the Bill contains the following provision:—

> "And it is hereby agreed and declared by and between the grantor "and grantee that the moneys hereby secured are the same moneys "as are secured by the document or documents hereunder described "(a copy or copies of which is or are annexed hereto) and that any "default hereunder or thereunder shall be deemed to be a default "hereunder, and that the grantee may upon any default hereunder "or thereunder exercise the grantee's rights powers and remedies "both thereunder or hereunder either together or separately and in "such order as the grantee may think fit."

The clause contained particulars of the two promissory notes above-mentioned and a copy of them was annexed to the Bill of Sale.

The appellants in their defence have argued that the debts due under the promissory notes are merged in the debt due under the Bill of Sale; and hence that the promissory notes are unenforceable. In support of this argument they rely upon the judgment of the Court of Appeal in the *Commissioner of Stamps v. Hope,* [1891] Appeal Cases, page 476.

The learned Magistrate did not accept this contention and relied upon the judgment in *Monetary Advance Co. v. Cater,* 28 Q.B.D., 785; and observing that

> "It appears that although the promissory note may invalidate "the Bill of Sale it still remans valid itself",

he gave judgment for the plaintiff.

In the *Monetary Advance Co. v. Cater* the facts were that the defendants gave the plaintiffs a Bill of Sale of personal chattels to secure the repayment of a sum of money and interest, and at the same time, and as part of the same transaction, gave them his promissory note for the payment of the same sum and interest by instalments of the same amounts, and to be paid on the same days as provided by the Bill of Sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear, the whole amount outstanding should immediately become due and payable. In an action on the promissory note, it was held that though the stipulation in the promissory note rendered the Bill of Sale void, the promissory note was good and the plaintiffs were entitled to recover.

In the appeal now before this Court it is to be noted that while the promissory note, the subject of the action, matured on the 29th October, 1936, the covenant for repayment contained in the Bill of Sale was for repayment on or before the 28th October, 1937. There was thus a difference between the terms of the promissory note and those of the Bill of Sale similar to the difference which existed in the case of the *Monetary Advance Co. v. Cater,* and at first sight that case would appear to be conclusive as regards the present appeal.

Cater's case, however, was based upon the judgment of the Court of Appeal in *Davies v. Rees,* 17 Q.B.D. page 408. That was a decision upon the English Bills of Sale Act 1882[1], and the Court held that s. 9 of that Act, which declared a Bill of Sale which was not made in accordance with the form in the schedule to the Act to be void, rendered the bill void not merely as regards the personal chattels comprised in it, but also as regards the covenant contained in it for the payment of the principal and interest thereby secured. The judgment was based upon the fact that the scheduled form of Bill of Sale included a covenant for payment. This appears very clearly from the judgment of Fry L. J. at page 412, in which he says:—

> "Prima facie I should have thought that the Bill which was in-
> "tended to be made void was only an assignment of the chattels.
> "But s. 9 refers to a form of Bill of Sale given in the schedule to the
> "Act as that which is to be followed, and in that form there is con-
> "tained a covenant for the payment of principal and interest, and
> "it seems to me to follow clearly that for the purpose of s. 9, we are
> "bound to conclude that a Bill of Sale is an instrument of which a
> "covenant for the payment of principal and interest forms an in-
> "tegral part".

Clearly if the Bill of Sale were void not only as regards the assignment of chattels but also as regards the covenant for payment there could be no merger of the debt due under the promissory note.

When however, we turn to the Bills of Sale Ordinance 1879 (Ordinance 2 of 1879)[2] we find that the position is very different from that under the English Bills of Sale Acts. The provisions of the English Bills of Sale Act 1882 have never been adopted in this Colony and no form of Bill of Sale is scheduled to the Ordinance of 1879. Instead, we have in s. 3 a definition in the following terms:

> "In this Ordinance unless the context othewise requires—
> " 'bills of sale' shall include bills of sale assignments transfers
> "declarations of trust without transfer inventories of goods with
> "receipt thereto attached or receipts for purchase-moneys of
> "goods and other assurances of personal chattels and also powers of
> "attorney authorities or licenses to take possession of personal
> "chattels as security for any debt and also any agreement whether
> "intended or not to be followed by the execution of any other
> "instrument by which a right in equity to any personal chattels or
> "to any charge or security thereon shall be conferred . . . "

This list of instruments clearly includes several which do not contain covenants for payment; and hence it cannot be held that a Bill of Sale within the meaning of the Ordinance necessarily includes such a covenant, so that where a Bill of Sale is to be deemed fraudulent and void under s. 7 of the Ordinance, it does not neessarily follow that covenant for payment contained in the same instrument is also void.

It follows that the *ratio decidendi* in *Monetary Advance Co. v. Cater* has never existed in the present case, and *Cater's* case cannot be relied upon as establishing that there is no merger of the debt under the promissory note in the debt under the Bill of Sale, even if the bill be void as regards the assignment of chattels, a question which is open to doubt, in view of the fact that copies of the promissory notes were attached to the registered bill.

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[1] 45 *and* 46 *Vict. c.* 43.
[2] *Cap.* 179.

We have therefore to consider whether, assuming the covenant for payment contained in the Bill of Sale is not void, the debt under the promissory note, the subject of this action, is merged in the debt under the covenant. The appellants maintain that such is the case on the authority of *Commissioner of Stamps v. Hope*. In that case property in N.S.W. was sold under an agreement that part of the purchase money should be paid in cash and the remainder with interest should be paid by 12 promissory notes falling due at various dates, the payment of which should be secured by a mortgage of the property, which was duly executed. In such circumstances the Judicial Committee of the Privy Council held that there was only one debt and that had become a debt by specialty.

But they also observed with regard to the judgment in *Price v. Moult* 10 C.B., 561.

> "But if that is to be understood as importing that a merger of a "simple contract debt in a debt of a higher nature is effected by law "merely by the existence of an identical covenant, and notwith- "standing the plain intention of the parties to the contrary, that "is a proposition which their Lordships would hesitate to assent to.
>
> "It would appear to be contrary to other decided cases *Twopenny "v. Young*, 3 B. & C. 208, and Authorities Collected and Classified "under 2, *Fisher on Mortgages* 3rd edition, s. 1328 to 1334."

The case of *Twopenny v. Young*, to which the Judicial Committee referred, was decided in 1824 and has never been overruled, and it is clear that in the *Commissioner of Stamps v. Hope* their Lordships had no intention of overruling it ; thus their judgment cannot be relied upon as establishing that a merger is effected by law notwithstanding the express contract of the parties to the contrary.

In the Bill of Sale now under consideration, Clause 3 of the Clauses for Selection contains a clear argument that the Grantee (the respondent) may exercise his rights powers and remedies under the promissory notes, and I hold that these have not been lost by merger in his rights, powers and remedies (if any) under the bill of sale.

The next question raised by the appellants is that of novation. On the 10th July 1939 the parties signed a memorandum endorsed upon a copy of the Bill of Sale in the following terms:

> "Account stated between Birbal the grantee and Giwar Singh "and Bhagelu the grantors who admit and acknowledge that the "amount due under the within Bill of Sale and promissory notes "is the sum of £104 15s. 11d. and that Giwar Singh's indebted- "ness is the sum of £55 9s. 3d. and Bhagelu's indebtedness is the "sum of £49 6s. 8d., making the said sum of £104 15s. 11d. as "at this 10th day of July 1939."

The appellants' argument is that this memorandum operates as a novation and extinguishes the respondent's rights under the promissory notes.

This arguments has not been dealt with expressly by the learned Magistrate, but he clearly did not take the view that there had been a novation and I see no ground for holding to that effect. The memorandum is precisely what it purports to be, a statement of the amount due under the promissory notes and Bill of sale at the particular date.

The appellants further argue that action upon the promissory notes involves a wrongful division of a cause of action, contrary to Rule 22 of the Summary Procedure Rules 1916[1]; and that as there is only one debt which was for a sum in excess of £50, the Magistrate's Courts had no jurisdiction.

I am unable to acept this contention. While there may be only one debt it may be secured by more than one security, each of which may give rise to a separate cause of action; and the appellants made it clear by Clause 3 of the Clauses for Selection that they intended that the respondent should have separate cause of action in respect of the sums secured by the promissory notes respectively. This objection therefore fails.

There remains only the question of the appellants' counter-claim, as to which the parties agree that, owing to a misunderstanding, the appellants were not afforded an opportunity of calling evidence to establish their counter-claim.

As regards the respondent's claim, therefore, the appeal is dismissed and the record is remitted to the Magistrate's Court for evidence to be heard with regard to the counter-claim and judgment given thereon.

HAKIM KHAN *ats.* POLICE.

[Appellate Jurisdiction (Corrie, C.J.) June 24, 1943.]

Arms Ordinance, 1937[2]—jurisdiction of District Commissioner in case of indictable offence—retrospective effect of amendment to procedure—validity of information relating to several distinct weapons—allegation that defendant "refused to produce or point out" arms—duplicity of charges—distinction between "failing" to produce etc. and "refusing" to produce etc—finding that weapon is unserviceable—whether an unserviceable weapon is an arm—meaning of "premises" in certain circumstances.

The appellant was alleged to have been in posession of an assortment of firearms on 3rd August, 1942, the date of execution of a search warrant at his father's premises where he occupied a separate (locked) room. Appellant was convicted on two charges under the Arms Ordinance 1937[2]—one of unlawful possession of arms (s. 4—(1)), the other of unlawfully "refusing to produce or point out" the same arms (s. 30—(3)). The appeal proceeded on a number of grounds, particularly:

(1) A contention that as, at the date of the alleged offences, s. 4 created an indictable offence only the District Commissioner had no jurisdiction.

(2) That a charge of "refusing to produce or point out" is bad for duplicity.

(3) That the information was bad as it related to more than one weapon.

(4) That the search of Defendants room was illegal as the warrant was in respect of Defendant's father's premises.

A further point not taken by the appellant but made part of the judgment on the appeal was that one of the weapons was unserviceable.

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[1] *Rep. Vide Magistrates' Courts Rules, 1945 O. IV r. 12.*
[2] *Vide Arms Ordinance Cap. 197.*