Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hodges and Another v. *The Delhi and London Bank, Limited, from the Court of the Judicial Commissioner of Oudh; delivered* 21*st July* 1900.

Present at the Hearing :

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Hobhouse.*]

The Appellants in this case were Defendants in the suit brought by the Respondent Bank. They had different defences and their reasons in support of the Appeal are different. For Defendants so situated to join in a single appeal is an irregular proceeding and might easily result in inconvenient consequences. But they have been allowed to lodge separate cases and their Lordships have heard them by separate Counsel; and as matters turn out the misjoinder in Appeal will not cause any embarrassment.

On 29th January 1886 three documents were executed for the purpose of securing a loan made by the Bank to Colonel, then Major, Oldham of the 12th Native Infantry, then quartered at Lucknow. The first is an indenture made between Colonel Oldham of the 1st part, Katherine Hodges widow of Loodiana and the Defendant Captain Craster then a Lieutenant in the same regiment of infantry of the 2nd part, and the Bank of the 3rd part. After reciting

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that Rs. 4,500 had at the request of the other three parties been advanced by the Bank to Oldham upon an agreement for repayment as thereinafter provided, it is witnessed that the three parties jointly and severally covenant with the Bank that Oldham shall pay the principal and interest and the premiums on a life policy by monthly instalments of Rs. 300 beginning on the 10th March next; the whole amount to be recoverable on failure to pay any instalment. The last clause of the deed runs as follows :—

"And it is hereby also agreed and declared, that although "as between the said Arthur Oldham and the said K. Hodges "and J. C. B. Craster, the said K. Hodges and J. C. B. "Craster are to be considered as sureties only for the said Arthur "Oldham, yet as between the said K. Hodges, J. C. B. Craster, "and the said Bank, the said K. Hodges, and J. C. B. Craster "are to be considered as principal debtors to the said Bank, so "that the said K. Hodges and J. C. B. Craster, their heirs "executors or administrators or either of them shall not be "discharged or exonerated by any dealings between the said "Arthur Oldham his heirs executors or administrators and "the said Bank whereby the said K. Hodges and J. C. B. "Craster as sureties only for the said Arthur Oldham would "have been so discharged or exonerated."

The second of the three documents is a letter written by Mrs. Hodges to the Bank. It states that she hands to the Bank certain certificates for shares in other banks with a power of attorney to enable the Bank to sell them. In the event of her loan account with the Bank (joint and several with Oldham and Craster) becoming out of order by infringement of any of the conditions of the bond securing it, the Bank may sell for the credit of the Loan Account. The third document is the power of attorney mentioned in the letter.

On 8th June 1886 Mrs. Hodges died, and the Appellant Robert Hodges is her administrator. In September 1886 Colonel Oldham failed to pay the instalment due to the Bank. He applied for delay, but was informed by the Bank that it could not be granted without the consent of his

sureties. Craster consented to a delay of four months, but no consent could be given on the part of Mrs. Hodge's estate to which no representative had then been appointed.

After this much time was consumed in applications by the Bank for payment and proposals on the part of Oldham for delay. On the 26th July 1888 Mrs. Oldham wife of the Colonel executed a bond whereby she charged her interest under her father's will in consideration of the forbearance of the Bank from suing Oldham, Hodges, and Craster till the 1st May 1889. This suit was brought on 2nd May 1889 to obtain payment from the parties personally liable and from the estate of Mrs. Hodges.

The defences raised by Robert Hodges which are now material are these: First he says that Mrs. Hodges was a *quasi parda-nashin* lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question; which were not explained to her, and on which she had no independent advice. Secondly he says that her execution of the instruments was obtained by undue influence and misrepresentation on the part of Colonel and Mrs. Oldham. Thirdly that the Bank had given time to the principal debtor and had thereby discharged the surety.

The fourth and fifth issues stated by the First Court were as follows:—

"4. Was Katherine Hodges a *quasi parda-nashin* lady and "uneducated?

"5. Did Katherine Hodges execute and understand the "documents alleged to have been executed by her?"

The First Court answered the fourth issue in the negative (*Rec. p.* 267). On the fifth issue the learned Judge thought that Mrs. Oldham explained the deeds to Mrs. Hodges, and he says it is apparent that Mrs. Hodges was not a person to sign deeds without first knowing what they

contained. He therefore answered the fifth issue in the affirmative. But this latter finding must be taken as qualified by a subsequent part of his judgment.

It will be convenient here to state the position and character of Mrs. Hodges. The main features are summed up shortly in the judgment delivered by one of the learned Judges in the Judicial Commissioner's Court :—

"Mrs. Hodges was by birth a Kashmiri, sister of a well-
"known Kashmiri gentleman, a political pensioner. Mr. Hodges
"was employed in the Kapurthala estate and died during the
"Mutiny. Mrs. Hodges continued to live in Ludhiana till
"October 1885, staying during the hot weather with the
"Reverend J. Woodside at Landour. In October 1885 she
"began to live with her son-in-law Major Oldham at Lucknow.
"She was a woman of superior mental capacity. She could
"not understand English, but could read and write Urdu in
"the Roman character. Her habits were those of a native in
"this country. She did not appear before strangers, but had
"a limited circle of friends either natives of the country, or
"Europeans connected with natives of the country before
"whom she appeared. According to Mr. Woodside, though
"Mrs. Hodges had great ability she was incapable of doing
"business such as getting interest on her Government Pro-
"missory Notes. According to Colonel and Mrs. Oldham she
"managed all her affairs. The Respondent Hodges has
"admitted that with the exception of certain remittances to
"England, Mrs. Hodges transacted all other business herself
"(Exhibit 25). There can be no doubt that for 27 years she
"managed her affairs with prudence and success, possibly with
"some assistance from friends."

A few particulars may usefully be added. Her marriage with Mr. Hodges is said to have taken place in the year 1838 when she must have been hardly fifteen years old. It was solemnised by the Reverend Mr. Rogers according to the rites of the Presbyterian Church. She then took the Christian name of Katherine and retained it during her life instead of her birthname of Piyari Phundo Khanum. Her children five in number were all baptised into the Christian Church. Her husband was killed at Delhi in 1857. It does not appear that she ever ceased to be Mahometan in religion, and she clearly was of that religion both

before her marriage and during her widowhood. But the statement that her habits were those of a native Indian must be taken subject to the qualifications necessarily resulting from the events of her life, and to the fact that during widowhood she resided much with Mr. Woodside a Christian missionary, and appeared uncovered before his male servants as well as her own.

In this part of the case there is no discrepancy in the evidence except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a parda-nashin. The term quasi-parda-nashin seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the parda-nashin class, is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to purdanasheens must be extended to her. The contention is a novel one and their Lordships are not favourably impressed by it. As to a certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the Bank was bound to treat her on any other footing.

As regards the allegation that the security given by Mrs. Hodges was procured by undue

influence and misrepresentation on the part of the Oldhams there is absolutely no evidence beyond the facts that she was residing with them, that Mrs. Oldham was her favourite daughter, and was in the habit of explaining English expressions to her, as she did on the occasion in question. No formal issue was stated on this point, but it has been much pressed, though not so much at this Bar as in the Courts below. The Judicial Commissioner examines the matter very carefully and is at pains to show not only that Mrs. Hodges was freely consenting to the transaction, but that having regard to the family circumstances it was not at all an unreasonable thing for her to assist Colonel Oldham as she did.

On this important part of the case their Lordships have no difficulty in expressing agreement with both the lower Courts. In what comes afterwards it is difficult to follow them. The District Judge goes on to try the eighth issue. Did Katherine Hodges execute the bond as a principal or as a surety? Now when it had once been found that she was a competent woman of business and understood the deed and executed it willingly, nothing remained for the purpose of ascertaining her position except to construe the deed, unless there had been some special case set up making a distinction between one part of the deed and another, of which there is no trace in the pleadings the issues or the judgments. The deed is not open to any serious doubt. Mrs. Hodges covenants that Oldham shall pay. That makes her a surety, liable to pay the whole immediately on Oldham's default. She is a surety with all the rights of a surety to be indemnified by him and to have contribution from her co-surety. But as regards the Bank she was to be considered as a principal debtor, not so as to be liable while Oldham was meeting

the instalments, but so as not to be discharged by dealings between the Bank and Oldham which were otherwise calculated to discharge a surety. The District Judge however goes to the extrinsic evidence, and he decides that Mrs. Hodges was a surety pure and simple. His only grounds are, partly some loose general statements, made most of them subsequent to the deed, by Colonel Oldham and Mr. Langdon the Bank manager that she was surety, which is quite true; and partly because from the evidence of Mr. Woodside it is apparent that she never would have agreed to stand as a principal (*Rec. p.* 272).

The learned Judge can hardly have been serious in treating Mr. Woodside's opinion as evidence. But great stress has been laid at this Bar and was evidently laid in the Courts below, on the hardship which the last clause of the deed inflicts upon the sureties, and on the consequent probability that they would not have borne their part in the transaction if its exact effect had been explained to them. That its exact legal effect was not explained is probable enough, seeing that Counsel at this Bar found it difficult to say what effect it would have except the effect of avoiding the rule by which the sureties are now seeking to protect themselves. That rule, though established in English law, and imported into the Indian Contract Act Sec. 135, without express mention of all the qualifications which attach to it in England, has often operated as a surprise and hardship on creditors. It has long since become a common thing, at least in England, for prudent lenders of money to prevent its application by provisions like that which is found in the document under consideration. Whether that practice has been so common in India is not apparent. But it has been the

practice of the Plaintiff Bank, and this deed was copied from a printed form. Neither of the Courts below intimates that there is anything unusual in the provision, nor that in this particular case its insertion was in any way improper or calculated to deceive.

It seems to their Lordships not only not probable but highly improbable that a lady who was knowingly and willingly making herself liable for the whole debt in the, only too likely, event of Colonel Oldham's default, should draw back from that engagement on being informed that if it so chanced that the Bank gave indulgence to Colonel Oldham of a kind which is usually calculated to benefit all the debtors alike, her liability to the Bank would still continue. The addition to her responsibility was a minute one. Having swallowed the camel she would hardly strain at this gnat.

Nevertheless the District Judge having found that Mrs. Hodges executed the deed as surety, as she undoubtedly did, proceeds to treat it as if there were nothing else in it, and holds that she was discharged when time was given to Colonel Oldham. He does not bestow any examination on the question, or even put the question, whether as regards explanations given to Mrs. Hodges, or as regards her understanding, there is any different evidence applicable to the final clause of the deed from that which applies to the deed as a whole and which convinced him that she understood it.

On this question of suretyship the Judicial Commissioner's Court arrives at the same conclusion in a different and more legitimate way, *i.e.* on the construction of the deed. The judgment lays it down that inasmuch as the prior part of the deed created Mrs. Hodges and Captain Craster sureties, the latter part cannot make them principal debtors. Their Lordships cannot

understand this argument nor was it supported at this Bar. They have above given their view of the meaning of the deed.

18. The Judicial Commissioners however did not support the District Judge, because they thought that the Bank did not contract with Colonel Oldham to give him time. It seems however to their Lordships that having taken Mrs. Oldham's security, as the result of a correspondence with her husband, in consideration of forbearance from suing the three debtors, the Bank effectually precluded itself from suing between July 1888 and May 1889. If they could agree with either Court on the effect of the deed they would hold that Mrs. Hodges was discharged; but as they think that the construction of the High Court is wrong and that the District Judge is wrong in disregarding the final clause of the deed, they must affirm the liability of her estate to the Bank.

19. Captain Craster's case is different and much more simple. His personal position is in no way peculiar. He was a man living in the world, 32 years of age, and had been working with his regiment for about three years. He does not allege any improper influence on the part of his superior officer Colonel Oldham who procured his execution of the deed. His case is that Langdon the Bank manager misled him as to the nature of the deed. This is his account of what happened with Langdon.

"I saw Mr. Langdon in his office and said 'Colonel Oldham
" 'tells me that he is desirous of obtaining a loan from your
" 'Bank and I have come down to see you regarding the
" 'matter.' I said, 'do you consider that if I stand security to
" 'your Bank for so large a sum I shall be incurring any
" 'unnecessary risk?' Mr. Langdon replied 'No.' He said
" Mrs. Katherine Hodges will be security with you. She is
" lodging Bank shares as extra security. Colonel Oldham's
" life will be insured for a sum of Rs. 14,000, and Colonel
" Oldham will repay the loan at the rate of Rs. 300 per
" mensem. I said, Well, you must recollect I have no other
" means besides my pay and should anything happen to prevent
" Colonel Oldham paying up I can't do so. Mr. Langdon

" said in the face of the security of Mrs. Hodges, and the " shares that she has lodged and also Colonel Oldham's life " being insured, I do not see how you can run any great risk " since Colonel Oldham is paying Rs. 300 a month, and in the " event of his death we get the Rs. 14,000 Life Insurance. I " said, Very well, you accept me as a co-surety for the amount. " He said, Yes, a deed will be drawn up by which you will " become surety to the Bank."

20. Langdon says that this account is correct in the main, but he will not speak to every detail (p. 257); afterwards adding that he is convinced that he told Captain Craster that he would be a principal debtor; only that the Bank would not call upon him unless Oldham failed (p. 258).

21. The deed was brought to Craster for his signature by Oldham on the Rifle Range at Lucknow. He executed it without making any attempt to read it; relying as he says on Oldham, who told him that it was the Bond drawn up in accordance with his agreement made with Langdon. As to the tenor of the deed he says:—

" I understood the liability of a principal to be greater than " that of surety. I object to being called a principal debtor. " Had I read the passage in Exhibit A 1, 'are to be con- " 'sidered as principal debtors to the said Bank,' I would " never have signed Exhibit A 1. The said passage is quite " plain to me. I have borrowed money once of the Bank. " I had to sign and get a surety also. I can't remember " if that transaction was prior to the one in suit. The " look of the paper I signed for that transaction was some- " thing like Exhibit A 1. Had a stamp above and writing " below. I did not read the paper for that transaction. I " repaid the money."

22. Colonel Oldham says that he told Craster what Langdon had told him; that all would be jointly and severally liable. " The Bank may " come down on you directly without reference " to me " (p. 254). And again (p. 255) " I took " the Bond to him myself. I did not read it to " him. I explained it to him fully that he was " responsible irrespective of me. It was fully " explained to him that he would jointly and " severally be liable."

23. In fact both Langdon and Oldham, if they correctly remember what they said, appear to

have represented the liability of the sureties not as something less but as something greater than it actually was; viz., as an immediate liability to the Bank instead of one dependent on Oldham's default.

Captain Craster also relies on Langdon's refusal to give time upon Oldham's first application without consent of the sureties. That however cannot affect the legal rights of the parties; and indeed at this Bar it is only used in a legitimate way, as showing Langdon's real belief that Craster was a surety pure and simple, and so lending probability to Craster's statement that Langdon had misled him into believing the same thing. But this reference to sureties may have been merely a point of courtesy or of unnecessary caution, or perhaps only a civil excuse to Colonel Oldham for not giving the indulgence he asked. It is no more evidence that Langdon really misrepresented the effect of the deed to Captain Craster, than his acting at a later time without reference to the sureties would be evidence the other way. It ought to be treated as wholly insignificant.

Their Lordships have already mentioned their reasons for thinking it highly improbable that those who incurred the substantial liability of the whole debt would have scrupled at this particular clause. It has become important now, and Captain Craster may think that he would have treated it as of vital importance then, if all the consequences had been explained to him. But it has been before stated that he was a man who ought to have been, and probably was, able to look after his own affairs. He admits that the effect of the deed is plain to his understanding; only he did not take the trouble to read it. It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings, to escape from

the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea. The District Judge seems to have acted on Captain Craster's statement alone. He does not mention the counter statements of Oldham and Langdon. Taking Craster's statement it hardly amounts to more than that Langdon underrated the risk he was running, and said that he was to be surety (which was the fact) without any particular mention of the last clause in the deed; which very likely was not mentioned. That would not suffice to show that Langdon misled Craster. But putting all the evidence together their Lordships are satisfied that Craster was given to understand, perhaps even too broadly, that in his liability to the Bank he stood upon an equal footing with Colonel Oldham and Mrs. Hodges.

The District Judge granted a decree against the Oldhams and dismissed the suit as against Hodges and Craster with costs. The Court of the Judicial Commissioner gave a decree against all the Defendants. This their Lordships hold to be right though they differ as regards the grounds on which it should rest. The decree however is against all the Defendants personally to pay the whole sum found due or accruing due. That does not recognise the representative position of Robert Hodges, who is only brought here as administrator of his mother's estate. In delivering judgment the learned Judicial Commissioner states that Mrs. Hodges was in the possession of her husband's estate and remained the ostensible owner of the balance with consent of her sons, and that she was treated as the owner of the entire property by the Defendant Hodges in his application for probate. He states a formal finding on the sixth issue thus: "I "find that the Defendant Hodges is liable to the

" extent of the entire estate in the possession of " Mrs. Hodges." It does not appear that this Record contains the requisite materials for trying such a question, which is more appropriate for a separate inquiry; and it is not disputed by the Plaintiff's Counsel that, as Hodges has not admitted assets, it would be more regular to ascertain the measure of his liability by inquiries in the execution of the decree. Their Lordships think that it would be right to add to the decree as follows :—" But " as regards the Defendant Robert Nathaniel " Hodges this decree is, except as regards the costs " hereby ordered to be paid made against him " in his representative capacity. Let all proper " inquiries be made and accounts taken for the " purpose of ascertaining the amount of the " estate of Katherine Hodges and the liability " of the Bank shares pledged by her and of " her administrator Robert Nathaniel Hodges " to make good the debt due to the Plaintiff " Bank." Their Lordships will humbly advise Her Majesty to dismiss the Appeal and with the qualification just mentioned to affirm the decree. As regards the costs of the Appeal, the case of Captain Craster has wholly failed, and the case of Robert Hodges has failed on the most material points. Their Lordships think that the modification now made ought not to affect the costs; especially considering that no attempt was made in the Court below to review the judgment on this point. The Appellants must pay the costs.