Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gobind Chunder Sein v. *the Administrator-General of Bengal for the time being, from Bengal; delivered the* 21*st December,* 1861.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.

THIS was an action of trover, brought in the Supreme Court at Fort William in Bengal, to recover the value of certain bales of twist. The pleas were, Not Guilty and Not Possessed. The original Defendant was one Ryan, master of the ship "Aurora"—he is now deceased—and represented by the nominal Defendant; but as the action was defended on the indemnity of Messrs. Gouger, Jenkins, and Co., merchants at Calcutta, it will be convenient to treat them as the Respondents. The case was tried before the then Chief Justice Sir James W. Colvile, and Mr. Justice Jackson; they found a verdict for the Defendants, and subsequently discharged a rule for a new trial which had been applied for on the grounds of misdirection, and of the Verdict being against the evidence. Judgment was entered up, and against this Verdict and Judgment the present Appeal has been brought.

The undisputed facts of the case are substantially as follows:—The goods in question were shipped in London by Alfred Gouger on behalf of himself and a Mr. Stewart, and consigned to Gouger, Jenkins, and Co.; the bill of lading was forwarded to them.

At the time of the arrival neither Gouger nor Jenkins were at Calcutta, and the business of their firm was being carried on by James Tobin Cockshott under a power of attorney. The firm had been in the habit of employing a Banian by the name of Denonauth Sein; to this man Cockshott gave the bill of lading indorsed in blank, for the purpose of procuring a delivery order, and the delivery of the goods to the firm; but it was also part of the ordinary employment of Denonauth, which applied to the present transaction, to procure a purchaser, and when he had so done, he was to report the name of the buyer and the terms to his principals for their assent to the contract. If they agreed, their initials were written upon it, which being done the Banian had authority to deliver the goods to the purchaser and receive the price. Between the Banian and his principals there was an account current, which was balanced at the end of the month; he was then debited for the contract price of the goods sold, and credited for the sums which he paid to the house; he received his "dustoree," or commission, from the purchaser.

In the present case he contracted for the sale of the goods to one Doorgapersaud, and by the terms of the contract the goods were to be cleared away and settled for "within forty-one days after landing days from the date of the contract," 19th February, 1848. To this contract Cockshott assented, and affixed his initials, and thenceforward Denonauth Sein became entrusted, as between himself and his employers, with the bill of lading for the purpose of delivering the goods on the terms of the contract; they were by these terms made deliverable on payment in cash.

In this state of things Denonauth and Doorgapersaud went to the Appellant, a banker and moneylender. According to the evidence they represented to him that the latter had made a contract for the twist, and Denonauth produced the bill of lading; it was stated that Doorgapersaud could not pay the whole amount, between 23,000 and 24,000 rupees, in one sum, and that they (the two) wanted an advance. It was finally arranged that the Appellant should advance to Denonauth 20,000 rupees, less 400 deducted for discount. Denonauth gave him his own promissory note for the amount, and signed a letter prepared by him, which stated the fact of the

delivery to him of the bill of lading, and gave him authority to sell for his own benefit the goods in case of non-payment within one month and a-half, refunding any excess that might remain after deducting the principal and interest, and other charges, and making Denonauth liable to him for any deficiency on the sale. Upon the authority of this instrument the delivery of the goods was demanded by the Appellant, and refused upon the indemnity of the Respondents; and the present action brought.

It is stated that the 23,600 rupees were paid to Denonauth, and of these he paid 10,000 to the Oriental Bank on account of the Respondents, in obedience to a previous order, and had credit from them for the amount in the account current between them, in which he was at the time, and still remains, largely indebted to them in respect of previous sales and other transactions on their behalf.

Upon the trial some evidence was given as to the nature of Denonauth's employment, and the character and extent of his agency. The Court found that he received the bill of lading for the especial purpose of getting delivery of the goods, and that before the delivery order given, but after the receipt of the bill of lading, he informed his employers of the sale, and that they approved of the purchaser; that he was not strictly a factor, but more than a mere servant—an agent to find purchasers, and, under some circumstances, to guarantee the payment; that the bill of lading was allowed by Cockshott to remain in his hands to obtain delivery of the goods, and that he had full authority to give delivery to purchasers on payment of the price; that he was, in the transaction in question, an agent within the meaning of the last Factors Act; that it must be taken on the evidence that the contract of sale with Doorgapersaud was not fraudulent; and that the only question remaining was, whether the pledge to the Appellant was protected by that Act—as to which the Court thought that the facts raised the inference that there was *mala fides* on the part of Denonauth in dealing as he had done with the goods, and that the Appellant had notice that the pledge was without authority from the Respondents, and not *bonâ fide*. They therefore held that the transaction did not come

within the protection of the Factors Act, and that the verdict must be for the Respondents.

On this finding the rule was obtained which we have stated above, and, after argument, discharged upon the grounds stated in a very able and learned Judgment delivered by Sir James W. Colvile, the correctness of which their Lordships are now to consider. In doing so it may be convenient, in the first place, to dispose of the question of a misdirection; and this they will do very shortly; for it seems to them that there is not the slightest ground for this part of the rule.

The question which the learned Judges made the cardinal one in the case, was, whether the circumstances were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonauth had not authority to make the pledge, if not also that he was acting *malâ fide* in respect thereof against his principals.

This is precisely the way in which the question was put to the Jury in a case under the first Factor's Act, 6 Geo. IV, cap. 94, in Evans *v.* Truman (1 Moo. and Rob. 10); and this was unquestioned at the time, though the case came before the Court on another point; this mode of leaving to the Jury the question of notice was approved of by Lord St. Leonards, in Navulshaw *v.* Brownrigg (2 De Gex. M. and G., 452), as a proper mode under the last Factors Act, 5 and 6 Vict., cap. 39; on which in substance the present case depends. And their Lordships entirely concur in the principle established by these authorities. The question so put gives full effect, on the one hand, to the large words of the first section of the Act, and effectuates the object of protecting pledges and exchanges of securities made *bonâ fide* by agents entrusted with them, in consideration of advances made in respect thereof; and, on the other, it gives proper, and no more than proper, effect to the third section, which limits such protection to loans, advances, and exchanges made *bonâ fide*, and without notice, either that the agent making them has not authority to make the same, or is acting *malâ fide* in respect thereof against the owners of the goods represented by the document pledged. It makes the decision depend not at all on mere suspicion, on the want of inquiry or of reasonable caution in the party advancing on

the pledge, nor yet on the mere want of good faith in the agent, of which the party advancing is ignorant: all these, and such matters as these, which are in themselves inconclusive, and tend to embarrass the dealing with negotiable instruments, may be evidence; but the Tribunal deciding the issue, whether the Jury, or, as here, the Judges acting as a Jury, must, in order to bring the case within the third, and take it out of the first section, categorically find the facts of want of good faith, and of notice to the lender of want of authority in the agent, or that he is acting *malâ fide* in the transaction against his principal. The statute is silent as to the grounds on which the conclusion is to be arrived at; that is left to the ordinary principles of evidence. But where the fact is so found, it would be as much against mere honesty as against the interests of commerce properly considered to afford any protection to the transaction. This objection, therefore, to the Judgment entirely fails.

It remains to consider whether the Verdict was against the evidence, and in doing so it will be necessary to introduce some additional facts, which did not find their place in the previous summary.

Upon a careful consideration of all the circumstances, and after attention given to the arguments of the Appellant's Counsel, they are of opinion that the Judges below have drawn the only right conclusion, that to which their Lordships would have been themselves led, and that the Court has shown great caution in not pressing its inferences as far, perhaps, against the Appellant as in strict justice might have been warranted.

The Judges say that where there was a conflict of testimony between the Appellant and Denonauth on the one hand, and Mr. Jenkins and Mr. Cockshott on the other, they had been disposed to credit the latter rather than the former. Now it being assumed that Denonauth was an agent entrusted with the document of title to the goods, so as to bring the case within the first section of the Statute, the advance which the Appellant made will still not be protected unless made *bonâ fide*, and without notice that the agent making the contract had not authority to make the same, or was acting *malâ fide* against the owner. The Appellant must in the first place

have acted *bonâ fide* in making the advance; and, secondly, he must have been without notice of want of authority in the agent; or, thirdly, of *mala fides* in him against the owner. It appears to their Lordships that the evidence establishes all these three propositions.

As to the first, they assume that the Appellant really advanced the large sum of 19,600 rupees, but this alone will not establish his *bona fides;* he did so on advantageous terms to himself (whose business it was to lend money), in respect of the rate of discount and interest, and of perfect security, if the transaction should remain unimpeached. But beyond this it was essential to his *bona fides* that he should believe the representations of Denonauth and Doorgapersaud; and if he believed these, he must have believed also that the goods were actually sold to the latter, and were to be cleared and settled for in forty-one days: yet the terms of his advance were that he might, when he pleased, remove the goods at the cost of Denonauth to his own godowns, and at the end of a month and fifteen days sell them, if the advance were not then repaid with all charges. Now he says he did not come to this agreement without cautiously inquiring as to the Power under which Cockshott, the apparent principal for the time being of Denonauth, was said to be acting, and that he went to Cockshott for the purpose of seeing it, and did so. If he had been acting *bonâ fide* towards Cockshott, it seems to us that, exercising this somewhat superabundant caution as to the Power, it is incredible that when in Cockshott's presence he should have made no inquiry or communication respecting this particular transaction; yet their Lordships think it perfectly clear upon the evidence that he did not. When it is considered how conclusive that communication, one way or the other, would have been, they cannot doubt that it would have been made by any one about to enter into such a transaction *bonâ fide*, nor that it would have been stated, if it had been made; but neither does the Appellant affirm it in his evidence, nor was Cockshott cross-examined to it; and he having been examined on interrogatories before the trial, and not being at the trial, his silence on the subject is entirely consistent with the same conclusion. If the transaction had been *bonâ fide* on the part of the Appellant,

the communication, as we have said, would naturally have been made, but if it were *malâ fide*, it certainly would not; because it must have been known that it would put an end to the transaction at once, and that Denonauth would not have been allowed to pledge goods which were already under contract of sale. This circumstance however, strong as it is, does not stand alone. Denonauth comes to the Appellant, not armed with all the documents which are stated to be usually in the hands of an agent authorised to pledge, and without excuse for their absence; and he comes, too, as an agent who has already confessedly exhausted his authority in respect of the goods, by the contract which he has made for the sale of them, and who seeks to pledge them on terms inconsistent with the terms of that contract. The presence and implied assent of the purchaser, so far from lessening these difficulties, was of a nature only to increase the suspicions attaching to the transaction.

The evidence enables their Lordships to deal with the two remaining questions at the same time. Had the Appellant notice that Denonauth was without authority to make the contract of pledge, or that he was acting *malâ fide* against his principal? They think that the evidence warrants an answer in the affirmative as to both. First, it is clear that in fact he had no authority express as to this transaction, or to be implied from any previous course of dealing; and if in truth he had been allowed to pledge more frequently, or with greater similarity of circumstances to those of the transaction in question than the evidence here discloses, there is nothing to show that the Appellant was aware of this, or acted on the credit of it. Secondly, it is clear that in fact Denonauth was acting *malâ fide* towards his principals; the account current shows that he was largely indebted to them on the balance of prior transactions; he was bound, in order to maintain his post and credit with them, to make a payment for them at that time, and he sought to do this fraudulently by raising money on their own goods, which he would have to account for at a later period, and so forestalling the proceeds of them.

But of course these facts, though necessary as a basis, are not in themselves sufficient, without notice of them to the Appellant. Whether he had such

notice must be judged as any other question of fact. To adopt the question on which the Judges made their decision turn, Were the circumstances such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonauth had not authority to make the pledge, or that he was acting *malâ fide* in respect thereof against his principals? In answering this it must be remembered again that the Statute, though it insists on a conclusion, prescribes nothing as to the nature of the evidence on which it is to be founded, or the manner in which the inquiry is to be conducted. The question must be dealt with as any other question of fact, by a due consideration of all the circumstances. Then it may be taken here as if Denonauth had said, "I am the Banian of the Respondents; I hold in my hand the bill of lading of goods consigned to them, but not delivered. I have contracted to sell them to Doorgapersaud, who stands now beside me. My principals have sanctioned the sale, and he is to pay for them and clear them away in forty-one days. Now I desire you to advance me money on these goods; I will give you my own promissory note for the amount, and I will deposit the bill of lading indorsed with you; you may take the goods at my expense at once to your own godowns, and if I do not repay you at a period exceeding the date at which he is to clear and pay for them, you may sell them and pay yourself with interest, and all charges; and meantime you may deduct a large discount from the sum advanced;" and this offer is accepted, after a visit to Cockshott to see his power of attorney, and not a word said upon it to him at the interview.

The Appellant was a man of business; he had been himself a Banian; he either knew much of Denonauth and his dealings, or little—if much, it is clear upon the evidence, and very material, that he had never known him, as agent of the Respondents, deal with their goods in a similar way under similar circumstances—if little, the more caution was necessary. He did apply his mind to the matter, for he required personal satisfaction as to Cockshott's power. What then must reasonable men in turn applying their minds to these same circumstances believe to have been the clear conviction in the Appellant's mind as to Denonauth's authority or honesty? Their

Lordships think that there is but one answer to this, that he must have felt perfectly certain that Denonauth was acting without authority; if so, it is unnecessary to say whether with *mala fides*, though upon this they do not themselves entertain any doubt.

It remains only to notice a circumstance not very strongly relied on by the Appellant's Counsel, nor, perhaps, strictly relevant to the issues in the cause, but yet which it will be better to dispose of. It appears that in the account current between the Respondents and Denonauth for February, the month in which this transaction took place, the latter is credited with the sum of 10,000 rupees paid to the Oriental Bank for the former. These 10,000 rupees have been taken, in the argument, and are so now, to have been a portion of the 19,600 rupees advanced by the Appellant. It was urged that the accepting the 10,000 rupees with a knowledge how they were procured (a fact which stands not quite clear upon the evidence), was a ratification of the dealing between the Appellant and Denonauth. Their Lordships do not assent to this argument. The sale of the goods to Doorgapersaud not being to be completed until the month of March, would not come into the account between the Respondents and Denonauth until the end of that month; and in the account then to be made up if it had been regularly completed, he would have been debited with the price for which they had been sold and credited with the payment of that price to them. Meantime he being largely in their debt, and having been ordered to make a payment for them in respect of some prior dealings for them, had raised the money by this fraudulent pledge of their goods. Though he had so done, yet he was the principal debtor for this money to the Appellant on his own promissory note, and if everything had gone to its regular end, the Respondents would have received nothing more from him than they were entitled to. They have now received much less. As the payment was actually made to the Oriental Bank before it appeared in the account, and in pursuance of a previous order, the Respondents could neither refuse to give Denonauth credit for it, nor could they be called on to repay the money to the Appellant; any more than if, without the collateral

security of the pledge, it had been advanced on the personal security only of Denonauth. Their conduct, therefore, does not amount to a ratification of the pledge.

On all grounds, therefore, their Lordships will humbly advise Her Majesty that the Judgment below should be affirmed, and the Appeal dismissed with costs.