Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dean and another v. *Byrnes and others, from the Supreme Court of New South Wales; delivered 23rd July*, 1864.

Present:

LORD KINGSDOWN.
THE MASTER OF THE ROLLS.
SIR JOHN TAYLOR COLERIDGE.

TWO principal questions were argued in this Appeal:—

1. Whether, according to the pleadings, the Plaintiff could establish any claim upon the sugars from the Mauritius, beyond that which had been satisfied before the bill was filed, viz., beyond the sum of 3,000*l*.

2. Whether he had established any claims upon the sugars from Java.

The Judge before whom the case originally came was of opinion that the evidence sufficiently made out that the agreement between the parties was, that the Plaintiff's lien for the whole amount of his advances should extend both to the Mauritius and the Java sugars, but that by his bill he had confined his claim to the sugars from Java, and that he could not therefore be permitted to make any demand on the sugars from Mauritius.

The Supreme Court, on Appeal, was of opinion that this claim must be so limited, and the propriety of this decision is the first point for our consideration.

We should very much regret being obliged to adopt a construction of the pleadings which would shut out the real justice of the case, and exclude the Plaintiff from rights to which by his contract he

was entitled, and if the difficulty were created merely by paragraph 5 of the amended bill, we might, perhaps, be able to get over it. But on looking at the whole record, at the statement in the original bill, and the alterations introduced by the amendment, it appears to us that the statement of the contract as it now stands was made deliberately and repeated after much consideration, and that the construction put upon it by the Court is in accordance with the actual conduct of the parties, and that the agreement supposed to be proved by the evidence is in contradiction to that conduct.

The sugars from the Mauritius had all arrived at Sydney previously to the month of September 1860, and the sums actually realized by sales previously to that time, and paid to the trustees, amounted to about 14,000*l.*, a sum much more than sufficient to cover the whole demand of the Appellant, with interest; besides which there were sugars by the "Yarra" not sold till the month of January 1861, to the amount of 3,000*l.* and upwards.

According to the Appellant's present contention, he was entitled to a lien on these funds for the whole amount of his advances (10,999*l.* 15*s.* 3*d.*), made under one agreement and on one security.

But what took place in September 1860 seems quite inconsistent with any such agreement. He then, by arrangement with Jones and the trustees, received on Jones' bills, 6,083*l.* 1*s.* 2*d.*, and this sum he applied, as even by the amended bill he alleges, in discharge "of the 3,000*l.* and interest, and also in reduction of the 7,999*l.* 15*s.* 3*d.*"

Surely this is a strong confirmation of the fact that the advances were considered by the Plaintiff as distinct advances on distinct securities. After the receipt of the amount of these bills, there remained due to the Plaintiff the sum of 4,916*l.* 14*s.* 1*d.*, with interest. In the month of January 1861, the Java sugars by the "Monarch," and a portion of those by the "Visser," were sold.

The proceeds of the sugars by the "Monarch" amounted only to 4,883*l.* 0*s.* 2*d.*, and were therefore insufficient to satisfy the sum due to the Plaintiff. The proceeds of that portion of the sugar by the "Visser," which was sold in January 1861, amounted to 1,552*l.* 18*s.* 2*d.*, and the two sums together

would have been sufficient to satisfy the Plaintiff's demand.

These sales were made, and the proceeds were received by the Plaintiff as broker on the 30th January, 1861. He was called upon by the Trustees to pay over to them these sums.

The Memorandum of the agreement signed by Sayers in March or April 1860, relied on by the Respondent, in speaking of sugars from Batavia, mentioned only sugars by the "Monarch." But the Plaintiff contended that he was entitled to a lien on the sugars by the "Visser" as well as on those by the "Monarch." This claim was disputed by the Trustees, and on the 7th of March, 1861, the Plaintiff filed his original bill stating two distinct agreements, one for the advance of 3,000*l.*, on the security of the Mauritius sugars, and one for the advance of 7,999*l.* 15*s.* 3*d.* on the Batavian sugars.

The Bill stated that the 3,000*l.* advanced on the credit of the Mauritius sugars had been paid to the Plaintiff out of the proceeds of those sugars. It then stated that sugars from Batavia had arrived by the "Visser" and the "Monarch," and had been placed in his hands for sale without prejudice to the rights of the parties; that he had a lien on the proceeds of both the said cargoes of sugar for the amounts due to him, but that the Trustees threatened to sue him at law for the recovery of these proceeds; and it prayed a declaration that he had a lien on both the said cargoes, and an injunction to restrain proceedings at law by the Trustees. It is clear, therefore, that at this time he did not set up any claim on the Mauritius sugars, though it was doubtful whether the Batavian sugars included in his security would be sufficient to satisfy the full amount of his debt.

That this Bill related only to the Batavian sugars is beyond controversy. It is perfectly clear from the Bill, from the affidavits both of the Plaintiff and of Sayers, and from the proceedings on the motion for injunction. When an application was made for an injunction, it was ordered to stand over, with liberty to both parties to file fresh affidavits as to the proceeds of the cargo by the "Monarch," and, finally, by the order made on the 23rd of April, 1861, the injunction was confined to the sugars by the "Monarch."

The Defendants put in their answer to this Bill. The Trustees of Sayers severed in their answer. Cook and Irving insisted, that though the cargo by the "Monarch" was placed in the hands of Sayers for sale, without prejudice to any question between the parties; the cargo by the "Visser" was not made subject to any such conditions, and Cook alleged that at that time the Plaintiff set up no claim to any part of the cargo by the "Visser."

More than six months after the filing of the original Bill, the Plaintiff amended it. At this time the matter had been the subject of discussion in Court, the Plaintiff must have been fully alive to his rights, and he now had the opportunity of correcting any mistake which had been made in the statement of his case in his original Bill.

The amendments were directed to three points. First, he struck out the statement contained in the original Bill, that there were two several agreements between him and Sayers, and alleged only one agreement, but he left the statement of the contract in other respects as it stood in the original Bill. The effect being this, that Sayers being about to speculate in sugars to be imported from the Mauritius and Batavia, he, the Plaintiff, had engaged to make advances on the security of the sugars, and had first advanced 3,000*l.* on the faith of that agreement, and afterwards advanced 7,999*l.* 15*s.* 3*d.* on the security of the Batavian sugars.

The second amendment was directed to this point. The original Bill had stated that the 3,000*l.* had been paid out of the proceeds of the Mauritius sugars. The amended Bill stated, as the fact was, that the payment had been made by means of Jones' Bills; thirdly, in support of the Plaintiff's claims on the sugars by the "Visser," which was one of the main points in dispute, a charge was introduced that the sugars which arrived on board the "Visser" were in fact only the cargo of the "Monarch," and that the "Visser" and the "Monarch" respectively brought no cargoes except the cargo of the "Monarch."

The prayer of the bill remained unchanged, and although by altering the antecedent words to which the prayer relates its meaning might have been altered, in fact no such alteration was made, and the amended like the original bill sought relief only against the Batavian sugar.

That this is the true meaning of the prayer of the amended bill is stated distinctly in the third paragraph of the Plaintiff's petition of appeal against the Decree of the Primary Judge:—

"The cargoes of sugar mentioned in the prayer of the said bill are certain sugars which arrived in Sydney from Batavia at the time and under the circumstances in the said bill stated."

Now this is not a case in which the Plaintiff can have been mistaken as to the rights for which he had contracted. It is not the case of a written instrument which he may have misconstrued. The agreement was verbal between himself and Sayers, and if he supposed that he had any right against the Mauritius sugars it is inconceivable that instead of asserting it he should have persisted for months, and as far as appears up to the hearing, in urging doubtful claims against the Batavian sugars; admitting, if not in terms stating that all his claims on the Mauritius sugars had been satisfied. That this was the actual agreement is rendered at least not improbable by the fact that the 3,000*l.* were on the same day on which the money was advanced remitted to the Mauritius to purchase sugar, but no part of the other sum was so employed.

The document so much relied on by the Plaintiff, as containing the terms of the original agreement, is really of no value. It seems that a memorandum of those terms, whatever they really were, was made at the time. That memorandum was in the Plaintiff's possession. It is not produced, and he says that he has lost it. The memorandum contained in the letter signed by Sayers was not written by him; it was signed after he had become insolvent: it clearly does not contain the original agreement as now represented by the Plaintiff and nothing more, for it refers to bills of exchange to the amount of 10,823*l.* 5*s.* 5*d.* deposited as a collateral security with the Plaintiff which formed no part of the original agreement between the Plaintiff and Sayers, and it refers to sugars exported from Batavia by the "Monarch," and not by any other ship.

It seems to us that to give effect to what is now contended to have been the real agreement between the parties would be to contradict not only the statement of the Plaintiff in his record, but that which, up to the hearing, he has always shown by his

acts as well as his allegations that he considered to be the real agreement with Sayers. It would be to bind the Defendants by the terms of a parol agreement which has never been alleged, and which they have never had an opportunity of disproving.

Upon this point, therefore, we think that the Courts below were right.

There remains the question whether upon the facts appearing in evidence, the Plaintiff has established a right to a lien on the sugars from Batavia, or any part of them.

The facts, as far as we can collect them from the evidence, appear to be these :—

It was no part of the contract between the Plaintiff and Sayers that the monies advanced by him should be invested in the purchase of any particular sugars, or of any sugars at all. It was a personal loan by a broker to a merchant, who represented that he was speculating in the purchase of sugar, and the loan was procured by the engagement that the merchant would place in the hands of the broker for sale the sugars which he was expecting from two quarters, the Mauritius and Batavia, and that the broker should derive the profits of commission arising from the sale, and should repay his advances with interest out of the proceeds. The Plaintiff could not insist upon the investment of the monies which he advanced in any particular mode, nor insist upon the purchase by Sayers of any sugars in the Mauritius, Batavia, or elsewhere. If Sayers purchased no sugar, the Plaintiff had no remedy except by an action to recover his debt. In fact, no part whatever of his advances was invested in the purchase of the Batavian sugar. The 3,000*l.* which he first advanced were remitted, as we have observed, to Mauritius, and the remaining monies were not advanced by him till the months of January and February, 1860.

But the funds with which the Batavian sugars were purchased, as well those by the "Visser" as those by the "Monarch," had been remitted by Sayers to Messrs. Hunter and Co., his agents in Batavia, between the 17th and 20th of December, 859, and orders had been given by him to his agents at that time to invest them in the purchase of sugars. Those orders, with the funds themselves, were sent by the "Monarch," in which ship it was

intended that the sugars to be purchased should be sent home.

The funds and the orders were received by Hunter and Co. in Batavia, and the receipt was acknowledged by them in a letter dated the 12th of February, 1860. In this letter they stated the impossibility of executing the order for the purchase of sugars, and suggested various other modes of employing the funds.

On the 15th of February they wrote again to say that they were unable to procure any sugar, adding. "We fear, therefore, there is no other remedy but to find the ship employment till the sugar season comes round."

On the 23rd of April, 1860, they wrote again to say they were unable to procure any of the sugar required, though they were sending samples round amongst the planters, and hoped to succeed before the grinding began at the works.

At this time they had in their hands the monies which had been remitted to them by Sayers. But these monies had before this time ceased to be his property, and had passed to his trustees under the deed of the preceding 16th of April.

On the 3rd of May having met unexpectedly with an opportunity of purchasing a lot of sugar Hunter and Co. bought it for Sayers, and consigned it to him by the ship "Visser," and advised him of what they had done by a letter of that date.

The "Visser" seems to have arrived at Sydney in June or July 1860, and the cargo was claimed on behalf of Sayers' trustees on the one hand, and by the Plaintiff on the other; and on the 20th August, 1860, this cargo, as well as that by the "Yarra," was placed in the hands of Sayers for sale, and he signed a letter of that date by which he agreed to dispose of the same by auction, and to pay over to the trustees the proceeds thereof, and act generally under their directions in the matter.

We cannot make out from the evidence what was the sum produced by the first sale of the sugars by the "Visser." The portion sold in January 1861, with respect to which an Injunction was prayed, seems to have amounted, as we have stated, to 1,552*l.* odd.

We will assume that on the arrival of these sugars in Sydney nothing was done to affect the right of the Plaintiff, and that his claim stands upon the

same ground as his right against the cargo of the "Monarch."

With respect to this last cargo it appears that it was purchased under these circumstances.

The "Monarch" had been detained and employed by Hunter and Co. on behalf of Sayers in various voyages on account of Sayers from the month of February 1860, when she arrived, till the month of November 1860.

The exact time when Hunter and Co. heard of the insolvency of Sayers, and of his assignment to trustees for the benefit of his creditors, does not appear. We collect that they had not done so on the 23rd of June, for on that day they wrote to Sayers to say that they should wait for the April mail, which had not then arrived (which would, no doubt, convey the intelligence), and if they received by it no counter orders they would have the "Monarch" put in order and set about purchasing her cargo of sugar.

On the 6th of August they wrote to Captain Bremner, who seems to have been authorized to act on behalf of the Trustees, and who had called at Batavia on his road to the Mauritius, in these terms :—

"Batavia, August 6, 1860.

"Dear Sir,—Previous to your arrival from Australia we had waited two mails, expecting to hear from the Trustees of the estate of Mr. Sayers, relative to the disposal of the funds in our hands. Not having heard we determined on fulfilling his (Mr. Sayer's) original instructions, and load the 'Monarch' back to Sydney, and we accordingly contracted for the sugars only a few days before your arrival.

"We have perused Mr. Sayer's letter, and also the one to ourselves, likewise Messrs. Irving and Cooks' letter authorizing you to act in the matter, and we are glad to see that we have adopted the course that they wished.

"We shall endeavour to close Mr. Sayers' account to a point, and shall make up his account current with interest calculated to the time at which we render it."

Under these circumstances, thus collected from the correspondence, the sugars by the "Monarch" were purchased. They were dispatched on the 8th

of November, 1860, consigned to Sayers, and arrived in Sydney, and were sold in January 1861.

It may be admitted that if Sayers had remained solvent, the Plaintiff would have had the right which he now claims. But upon what ground? Not because the sugars had been purchased with his money; not because he had a lien on the monies with which they had been purchased; not that he had any contract with Sayers that the sugars should be purchased; but upon this ground, that Sayers had agreed that any sugars which he should purchase in Batavia should be subject to the Plaintiff's claim, and these sugars having been purchased by him in Batavia and consigned to Sydney, they would have been, as his property, bound by his agreement.

But the sugars actually purchased were not purchased by him, or with his money, or on his account. They were purchased by the agents in Batavia on account of the Trustees, with their money, and consigned to Sayers only as their agent.

It was argued that the Trustees must be considered to have adopted the contract of Sayers, and to have purchased the sugars subject to the equities of the Plaintiff under such contract. There would be great difficulty in holding that they had adopted the contract of Sayers by not interfering with the instructions given by him to his agents as to the investment of their funds in sugar. But the strong objection to this argument is, that there was no contract between the Plaintiff and Sayers as to the purchase of the sugars. Sayers was at liberty, as far as any engagement with the Plaintiff was concerned, to buy sugars or not. The Trustees thought that the investment in sugar was a good employment of their monies, and they therefore sanctioned it, but they did not thereby sanction a charge upon their property which might have attached upon the goods if they had remained the property of Sayers.

The reasoning upon which the Supreme Court has proceeded appears to us to be satisfactory, and we must humbly advise Her Majesty to affirm the Decree appealed from, with costs.