

*Judgment of the Lords of the Judicial Committee of  
the Privy Council on the Appeal of the  
Oriental Bank Corporation v. Justus Lembke,  
from the Supreme Court of Hong Kong; delivered  
Tuesday, July 22nd, 1879.*

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Present:

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR HENRY S. KEATING.

THIS is an appeal from a decree of the Supreme Court of Hong Kong in its appellate jurisdiction, dated the 21st April 1871, in a suit in which the present Respondent was the Plaintiff, and the present Appellants were the Defendants, by which it was ordered and decreed that a certain appeal which had been brought by the Appellants against a decree or order of the said Court in its original jurisdiction, dated the 12th January previous, should stand dismissed. By the said order of the Court in its original jurisdiction the Appellants were ordered and decreed within seven days after service of the said decree to pay to the Respondent the sum of 775*l.* 18*s.* 7*d.*, with interest thereon, calculated at the rate of ten per cent. from the 30th of June 1876 up to the date of payment, and also the costs of the suit.

The Appellants were a banking company carrying on business at Hong Kong, and also in London, and elsewhere; and the Respondent was a merchant and commission agent, also carrying on business at Hong Kong under the style and firm of Justus Lembke and Co.. The Respondent had for some time previously

been in the habit of sending produce home to the consignment of a firm in London called J. C. im Thurn and Co.; and in the year 1874 he received from Messrs. im Thurn and Co. a letter of credit dated the 26th of February in that year, the terms of which are as follows: "We  
 " beg to confirm to you a credit of 5,000*l.* We say  
 " five thousand pounds sterling to be availed of  
 " against consignment of produce to our address  
 " in your drafts at six months sight, representing  
 " up to 85 per cent, real invoice value. Shipping  
 " documents to accompany advice of drafts and  
 " insurance covered by our open policy. And  
 " we agree with you, the endorsers and *bonâ fide*  
 " holders of all bills if issued under this letter of  
 " credit, that the same shall be duly honoured on  
 " presentation and paid at maturity." After  
 the receipt of that letter of credit, namely,  
 on the 30th of July 1874, the Respondent drew a  
 bill of exchange of that date upon Messrs. im  
 Thurn and Co. in the following terms: "Hong  
 " Kong, 30th July 1874. At six months after  
 " sight of this first of exchange, second and  
 " third of the same tenor and date not paid, pay  
 " to the order of myself the sum of five hundred  
 " and twenty-five pounds sterling value received,  
 " and place the same to account of your letter  
 " of credit dated 26/2/74 at shipment T., No. 2,  
 " 1 case musk per P. and O. S.s. 'Malwa.' J.  
 " Lembke.—To Messrs. J. C. im Thurn and Co.,  
 " London." The bill was drawn by Respondent  
 expressly on the terms of the letter of credit re-  
 ferred to. He subsequently drew another bill on  
 the 14th August 1874 in the same terms for the  
 sum of 380*l.* sterling value received, and the  
 terms being the same, and the circumstances  
 connected with the two bills the same, they form  
 together the transaction which gave rise to the  
 suit between the parties.

The first bill of exchange on the day of its

date was taken for discount to the Appellants at their bank in Hong Kong, and was left at the bank, together with the letter of credit and a bill of lading of the consignment of musk against which the bill had been drawn; and on the same day a memorandum was sent by the Appellants to the Respondent in the following terms: " In connection with your drafts 525*l.* we require insurance letters and L Hypothecation, forms for which, in duplicate, we herewith forward to be filled up signed and returned, when we will pass proceeds to your credit and return letters of credit in due course."

On receiving that memorandum, the Respondent signed the letter of hypothecation which was so sent to him, prepared by the Appellants, and returned it to them. The effect of that letter of hypothecation has formed the subject of much discussion in the argument upon the present occasion. It was addressed to the Oriental Bank Corporation, and as far as is material is in these terms: " Having this day negotiated to you one bill of exchange drawn by me on Messrs. J. C. im Thurn & Co. of London, the particulars of which are noted at foot, and having at the same time handed to you as collateral securities for the due payment of the said bills the bills of lading and shipping documents of the several goods also stated at foot, my agreement is understood to be as follows: I authorise the Oriental Bank Corporation, or any manager or agent thereof, (but not so as to make it imperative,) to insure the above goods from sea risk, including loss by capture, &c." This first clause relates to insurance and what was to happen in case of loss. The next clause is: " I also hereby authorise the said Corporation, and the holders of the above bills for the time being, to take conditional acceptances to all or

“ any of such bills, to the effect that on payment  
“ thereof at maturity the above-mentioned bills  
“ of lading and shipping documents shall be  
“ delivered to the drawees or acceptors thereof,  
“ and such authorisation on my part shall be  
“ taken to extend to cases of acceptance for  
“ honour.” Then a further clause is: “ I further  
“ authorise the Oriental Bank Corporation, or  
“ any manager or agent thereof, on default being  
“ made in acceptance or presentment, or in  
“ payment at maturity of any of the above bills,  
“ to sell the said goods or a competent part  
“ thereof, and to apply the net proceeds (after  
“ deducting usual commission and charges) in  
“ payment of such bills with re-exchanges and  
“ charges, the balance (if any) to be placed  
“ against any other of my bills which may at the  
“ time be in the hands of the said Corporation,  
“ and, subject thereto, to be accounted for to the  
“ proper parties.” Evidently showing that this  
document in all its parts was intended for the  
benefit of the Banking Corporation and for  
their additional security. Then it goes on: I  
“ further authorise the said Corporation, or the  
“ holders of the said bills for the time being, at any  
“ time before their maturity, to accept payment  
“ from the drawees or acceptors thereof if  
“ required so to do, and, on payment, to deliver  
“ the said bills of lading and shipping documents  
“ to such drawees or acceptors; and in that  
“ event the said Corporation or the holders of  
“ said bills are to allow a discount thereon for  
“ the time they may have to run at the Bank of  
“ England minimum rate of the day if taken up  
“ in London, or if in India, Ceylon, China,  
“ Japan, Mauritius, or Australia, at the current  
“ rate of discount of the day,” &c. Then,  
“ Lastly, it is mutually agreed that the delivery  
“ of said collateral securities to your Corporation  
“ shall not prejudice your rights on said bills

“ in cases of dishonour, nor shall any recourse  
 “ taken thereon affect the title of the Corporation  
 “ to said securities to the extent of my liability  
 “ to your Corporation as above.” That document is signed by the Respondent alone, and there is a schedule describing the particulars of the bills.

Now their Lordships would point out that in the first place the bill of exchange, of which mention is made in that letter of hypothecation, is in terms a bill of exchange drawn expressly with reference to the letter of credit dated the 26th February 1874. It is a bill of exchange drawn in pursuance of the terms of that letter of credit, and was endorsed upon it at the time the letter of hypothecation was given as part of one and the same transaction.

What passed at the time appears on the case of the Respondent; it is there stated in paragraph 7: “At the same time that the  
 “ Respondent signed the said letter of hypothecation he endorsed the said bill of exchange  
 “ to the Appellants; and the Appellants, on  
 “ the receipt of the said bill and letter of  
 “ hypothecation, endorsed a notice of the drafts  
 “ against the credit on the said letter of credit  
 “ and returned it to the Respondent, and the  
 “ Respondent received the value of the bill of  
 “ exchange in account with the Appellants.” The letter of credit therefore is clearly connected with the letter of hypothecation; and it seems to their Lordships perfectly plain that the letter of hypothecation was intended by both the parties to be merely an additional security to the bank, giving them an option to do the various acts specified in the different clauses of it, should they think fit so to do, but in no way getting rid of the letter of credit or disconnecting it from the transaction. The learned Counsel argued that the letter of

credit was, as it were, put aside, and the letter of hypothecation substituted for it; but it appears to their Lordships plain that the intention of the parties was that those two documents should subsist together, and further that they are by no means inconsistent the one with the other. Indeed, when looked at in their plain and mercantile sense, they appear to be perfectly consistent and quite natural. Here were parties living at Hong Kong having correspondents in London. The Respondent has a letter of credit authorising him to draw within a certain limit upon his correspondent in London, but against shipping documents. Wishing to negotiate the bill with the Appellants, he takes the bill to the Appellants, also residing in Hong Kong having their correspondents in London, and proposes to them in the first instance to negotiate the bill simply upon the letter of credit. Now, had the negotiation taken place upon the letter of credit, the course pursued would have been precisely that of which alone in the present suit the Respondent complains; because, according to the course of things indicated by that letter of credit, the delivery of the shipping documents would in pursuance of it have taken place at the time of the acceptance by im Thurn & Co. in London of the bill of exchange, and their Lordships see no reason to suppose that the Appellants intended to do anything else than to increase their security by obtaining the letter of hypothecation. Taking into account the distance of Hong Kong from London, the Appellants might naturally desire to have the letter of hypothecation, giving them a control over the goods, and allowing them to take those proceedings at their option which might become necessary in events not impossible to happen. In other words, the object of it was to give them power to act according to circumstances.

The Appellants accordingly discounted this bill, and paid over the amount of it to the Respondent. They forwarded the documents to London; and upon that day, the 30th July 1874, the Respondent communicated with im Thurn & Co., his correspondents in London, and, amongst other things, in that communication he alludes to this bill of exchange, and says: "Against the above consignment I have this day taken the liberty of drawing upon your esteemed firm, under your credit of February 1874, bill No. 1/88, 525*l.*, 6 m/s own order, which draft I commend to your kind protection. The bill is in the hands of the Oriental Bank Corporation, and documents, namely, bills of lading, abstract of invoice, letter of hypothecation, and insurance letter, are attached thereto; the draft was sold documents against payment." Meaning no doubt that the Oriental Bank Corporation had the power to hold the documents as against payment. Then he continues: "I believe however that your esteemed firm may also obtain the documents against acceptance only."

The belief that he so expressed in the letter coincided with what took place, because the Oriental Bank Corporation in London, probably satisfied on the spot with the solvency of im Thurn & Co., took their acceptance of the bill, and handed over to them the shipping documents. In other words, they gave up the option secured to them by the letter of hypothecation, and proceeded as they would have proceeded had there been no such letter. Having done so, the transactions between the parties continued for some time; im Thurn & Co., having obtained the shipping documents, sold the goods, and seem to have passed the proceeds in account with their correspondent, the Respondent; but unfortunately they failed before the bill became

payable. The bill having been dishonoured at maturity, the Respondent was called upon by the bank to take it up, which he did under protest, contending that he had been discharged by the bank's having given up the shipping documents before payment of the bill. Thereupon he instituted a suit against the Appellants in order to recover the amount which he had paid to them under protest.

The case first came before the Chief Justice in the Supreme Court sitting in its original jurisdiction, and the trial took place without the intervention of a jury. In truth, all throughout this case there has been no dispute about the facts, but the Respondent called certain commission agents, merchants, and bank managers to give their opinions as to what was the duty incumbent upon the present Appellants, having received the letter of hypothecation as well as the letter of credit. Their opinions are not given in a very clear manner, and it is not at all necessary to consider the effect of their evidence, if evidence it can be called. Whether it could have been admitted if it had been objected to, or whether it was open to the observations of Mr. Justice Snowden, who afterwards expressed the opinion that it was not admissible at all, it is also unnecessary to consider, because whatever the effect of this evidence may be, or with whatever object it may have been adduced, it cannot control the construction of the written documents. It does not seem to their Lordships that there is any doubt or ambiguity that could give rise to the admissibility of any such evidence. The documents seem themselves to be perfectly clear, the simple question appearing to be whether the present Appellants were bound to hold over the shipping documents under the circumstances, or whether they had a right, if they pleased, to hand them over as they did to obtain the acceptance of im Thurn & Co.



Their Lordships see no reason to doubt that according to the true construction of the letter of hypothecation, taken together with the letter of credit, and the form in which the bills were drawn, the Appellants, notwithstanding they had the option of withholding the documents, were justified, if they pleased, in taking the course which they adopted.

The Chief Justice, upon the hearing of the suit, seems to have taken the same view of the written documents as that now expressed by their Lordships; but having admitted the evidence of witnesses as to the duty of the bank, he seems to have thought himself controlled by their opinion. Perhaps it would have been better had he adhered to the opinion which he had at first formed, and which appears to have coincided with that which their Lordships entertain, and which was also entertained by Mr. Justice Snowden in the Court below when the case came before it in its appellate jurisdiction.

Under these circumstances their Lordships will humbly advise Her Majesty that this Appeal be allowed, that the decrees below be reversed, and that judgment be entered for the Defendants, with costs in both the Lower Courts; their Lordships are also of opinion that the Appellants should receive the costs of this Appeal.

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