Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Elliott v. *Turquand, from the High Court of Judicature at Jamaica; delivered November* 10*th*, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS Appeal arises in an action brought by the Respondent, the trustee in bankruptcy of Messrs. Cottam, Mortan, and Co., West India merchants, to recover from the Appellant, who was their agent in Jamaica, the sum of 560*l.* which was paid to him, by a person of the name of MacCormack, as an instalment of the purchase money of the Savoy estate in Jamaica. The defence to the action rests on a claim to set off against this sum of 560*l.* a larger amount due to the Appellant (the Defendant) from the bankrupts, and the question in the Appeal arises on that claim.

The facts relating to the general course of dealing between the parties are shortly stated by the Chief Justice, who tried the action. His statement of them is this:—"For several years "previous to the bankruptcy the Defendant "had acted as the agent of Cottam, Mortan, and "Co. in respect of Savoy and Yarmouth estates, "and also of their shipping and general business. "He financed the estates, consigning the produce "to the firm in London, and drawing on them "for the expenses of management by means of "bills which were discounted by the Colonial

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Bank in this island. As of the 9th of "May 1878, the Defendant was in credit on account of Savoy in a small balance of 29*l.* 2*s.* 9*d.* "As of the 30th of June of the same year, he "was apparently in debt on account of Yarmouth in the sum of 73*l.* 3*s.* 3*d.*, but this "included three bills drawn by him on and "accepted by the firm of 200*l.* each, which were "subsequently protested for nonpayment, "amounting in all to 600*l.*, and for which he is "liable to the bank, who are the holders. There "is also a balance due to him, exclusive of the "bills, for disbursements on account of the "subsequent working of the estate (which is "now in the Incumbered Estates Court) to the "6th of September, amounting, after deducting "the 73*l.* 3*s.* 3*d.* and a credit of 30*l.* for "logwood, to about 179*l.* Upon the general "account the Defendant appears to be a creditor "to the extent of 400*l.*, of which he states that "he has had to take up one bill for 200*l.*, and "that on another for the like amount he is "liable to the bank."

It appears from the course of business thus described that the Defendant and the bankrupts had mutual dealings with and trusted each other. They trusted each other with credits which were likely to terminate, and in fact did terminate, in debts. Accounts were kept and rendered in the manner which is usual between West India merchants having estates in the West Indies, and their agents who manage those estates for them. The Defendant advanced moneys, made disbursements, and became liable on bills for the bankrupts. It appears that the bankrupts at the time of the bankruptcy were indebted to the Defendant upon the accounts both general and special, taking them together, in a sum far exceeding the 560*l.* Some of the items of the accounts were actual debts,

others were credits clearly of a nature within the 39th section of the Bankruptcy Act, which must and did end in debts; and it is not questioned that those debts were incurred by, and those credits given to the bankrupts, before the act of bankruptcy.

The facts relating to the particular sum in dispute may be shortly stated. The Defendant was entrusted by the bankrupts with the sale of the Savoy estate. He was so employed, no doubt, as being their general agent in the island. The sale appears to have been completed on the 1st of October 1877 by a conveyance of that date from Mr. Lambert, one of the firm, to Mr. MacCormack. On the back of the deed is found a receipt for the purchase money expressed in the deed, viz., 1,460*l*. The receipt is signed by Lambert. From an expression in a letter of one of the bankrupts it may be gathered that the deed was executed as an escrow. Although the facts are not clearly stated in the evidence, it appears that, besides the estate, stock to the value of 600*l*. was at the same time sold by the Defendant on behalf of the bankrupts to MacCormack. An arrangement was made that 1,000*l*., part of the purchase money of the estate and stock, should be paid at once, and the remainder by two instalments of 500*l*. at intervals of a year. The first of these instalments, which, with interest at six per cent., was paid by MacCormack to the Defendant, is the subject of this action.

On the 17th of August 1878 the bankrupts in England filed a petition for liquidation by arrangement in bankruptcy. Their creditors met, and the Plaintiff was appointed trustee; his appointment bearing date on the 26th of September 1878, at which time his title to the property of the bankrupts actually accrued. The payment of the 560*l*. was made to the

Defendant by MacCormack on the 26th of August 1878, after the filing of the petition for liquidation, which was undoubtedly an act of bankruptcy, but before the 26th of September, when the trustee was appointed, and the estate of the bankrupts became vested in him.

The general result of the evidence given at the trial appears in the facts which have been already stated. The learned Judge put three questions to the jury. The first was:— "At the time of the act of bankruptcy "were Cottam, Mortan, and Co. indebted to "the Defendant upon their mutual accounts "and dealings in a larger amount than 560*l.* "received by him?" The jury found that they were. There is therefore, as already stated, no question that the bankrupts at the time of the act of bankruptcy were indebted to the Defendant in a larger amount than the 560*l.* The second question was:—"Had the "Defendant at the time he received the money "notice of an act of bankruptcy committed by "them?" The answer was, "He had not." That also must be taken as conclusively found by the jury. The third question was:— "At the time he received the money was the "Defendant's authority from Cottam, Mortan, "and Co. determined," and the answer is:— "It was." This question, it may be observed, assumes that there was an authority given by the bankrupts to the Defendant to receive the instalments of the purchase money from the purchaser; and from the facts that have been already stated, and which appear at more length in the evidence, their Lordships have no difficulty whatever in coming to the conclusion that the Defendant had authority from the bankrupts to receive the money and to place it to the mutual account existing between them.

With regard to the finding of the jury that the authority was determined, it is plain that it was not a finding of any fact by them. It was merely the affirmance of a conclusion of law which had been drawn by the Chief Justice, and which he directed them to find as if it were a question of fact. The direction of the judge upon that point, and the finding of the jury in conformity with it, afford the main ground upon which the Court held that the Plaintiff was entitled to recover. The grounds upon which the Court so decided appear to be that the authority which had been given by the bankrupts to the Defendant to receive the money was revoked and determined by the act of bankruptcy, that the title of the trustee had relation to that act, and that the Defendant, therefore, could not avail himself of a set-off. Now at the time the Defendant received the 560*l*. he became accountable to the bankrupts for it, and if the bankrupts had the next day brought an action against him to recover it he might undoubtedly have set off the larger debt which they owed him. The question is whether he may not now do so against the trustee, notwithstanding the previous act of bankruptcy, it being found as a fact that at the time he received the money he had no notice of it. Their Lordships think that he may do so, and that the case falls within the 39th section of the Bankruptcy Act—the Act of 1869. The actual title of the trustee to the property of the bankrupt did not accrue until his appointment on the 26th of September; and though no doubt that title is for many purposes taken back by relation to the act of bankruptcy, the same Statute which creates that artificial relation provides in effect that in certain cases the relation shall not take place. Amongst the cases for which it so provides is the class of cases where mutual dealings, mutual credits,

or mutual debts exist; and as to such cases the effect of relation appears, by the legislation regarding them, to be neutralised and destroyed. Section 39 is this: "Where there have "been mutual credits, mutual debts, or other "mutual dealings between the bankrupt and "any other person proving or claiming to prove "a debt under his bankruptcy, an account shall "be taken of what is due from one party to the "other in respect of such mutual dealings, and "the sum due from the one party shall be set off "against any sum due from the other party, and "the balance of such account, and no more, shall "be claimed or paid on either side respectively; "but a person shall not be entitled under this "section to claim the benefit of any set-off "against the property of a bankrupt in any "case where he had at the time of giving credit "to the bankrupt notice of an act of bankruptcy committed by such bankrupt and "available against him for adjudication."

It is observable that no time is mentioned in this section at which the account is to be taken. It has been argued that the account is to be taken to the time of the act of bankruptcy and not later, except as regards credits previously given which may afterwards terminate in debts. But the section is not so confined. The object was, that where there are mutual accounts a secret act of bankruptcy should not stop the currency of those accounts. In some of the former Statutes the words, "notwithstanding a previous act of bankruptcy" are inserted. Although these words do not occur in the present section, their Lordships think that enough appears in the section from which an implication, equivalent to them, arises. The proviso at the end is, "but a person shall not be entitled "under this section to claim the benefit of "any set-off against the property of a bank-

" rupt in any case where he had at the time of " giving credit to the bankrupt notice of an act " of bankruptcy." The proviso says nothing with regard to credit given by the bankrupt to such person. The insertion of this proviso shows that the substantive part of the section cannot be read as referring only to mutual dealings and accounts prior to the act of bankruptcy, because if it had been intended that the account was to stop at the act of bankruptcy the proviso would be meaningless and an unnecessary addition to the section. By fair implication, therefore, it may be taken that the Legislature did not so intend. The existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy, until notice of it. It is unnecessary for their Lordships to decide what is the precise period at which an account of this kind, viz., an account of mutual dealings and transactions, is to stop. That must depend on the circumstances of each case and the nature of the credits, but their Lordships think that at least up to the time when the party who claims the benefit of the 39th clause has notice of an act of bankruptcy, the mutual account may and ought to be taken.

It is unnecessary, in the view their Lordships take of this case, to decide whether the authority to receive the purchase money of the Savoy estate was a giving of credit by the bankrupts to the Defendant within the meaning of the 39th clause. If the deed of conveyance had been entrusted to him for this purpose the case would be very like some of the instances referred to in *Rose* v. *Hart*. Their Lordships, however, do not find sufficient evidence of the deed having been handed over to him for that purpose. But authority was undoubtedly given to the Defendant in the course of mutual dealings to receive the

purchase money and to place it to account; in fact, he had received the first 1,000*l.*, and given credit for it in an account sent to the bankrupts and acknowledged by them before the bankruptcy. When under the same authority he afterwards received the 560*l.* in question, it was no longer a credit, but a debt due from him to the bankrupts, and, as a debt, it would properly form an item in the mutual account.

The Judges of the High Court, as already intimated, based their judgment mainly on the ground that the authority to receive the money was revoked by the act of bankruptcy. That point has been most elaborately argued at their Lordships' bar by the learned counsel for the Respondent, but their Lordships are unable to assent to the view taken by the Court. Authorities which appertain to protected transactions are not in all cases revoked by an act of bankruptcy. If it were so, the protection given by the Act would in many cases be of no avail. Authorities given in the course of mutual dealings, and necessary to the continuance of those dealings, are, by implication, excepted from the rule that authorities are revoked by an act of bankruptcy. They continue and remain unrevoked by virtue of the provision which protects such dealings, in the same way as powers necessary to give effect to protected sales continue and remain unrevoked by an act of bankruptcy. If this were not so, in some cases of mutual credits the protection professed to be given would be illusory. In the case in the Common Pleas referred to in the argument, *Naorogi* v. *The Chartered Bank of India* (L.R., 3 C.P., 444), which was argued and treated as if the estate was administered in bankruptcy, though the action was brought in the name of the trader himself, under a deed of inspectorship, the bills had been delivered by the trader, before

the execution of that deed, to the Chartered Bank of India to collect. The amount of the bills was received by the Bank after the deed. It was held that this delivery and the authority to collect constituted a credit within the rule in *Rose* v. *Hart*, and it was supported as a credit within the mutual credit clause of the then Bankruptcy Act. It was assumed in that case that the authority was a revocable one. If the view taken by the Court below is right, this authority would have been revoked before the Bank received the amount of the bills, and the judgment which held the transaction to be within the mutual credit clause would be incorrect. Their Lordships, however, see no reason to doubt the soundness of that decision.

The subject of the revocation of general powers by an act of bankruprcy with reference to protected sales came before the Lords Justices in the case of *Exparte Snowball*, L.R., 7 Ch. App. 534. Lord Justice Mellish, in giving the judgment of the Court in that case, said:—
" We are of opinion that though, no doubt,
" as a general rule, a power of attorney must
" be treated as revoked by an act of bank-
" ruptcy committed by the giver of the power
" as against the trustee under a subsequent
" bankruptcy, still if after the act of bank-
" ruptcy, but before the adjudication, property
" is conveyed under the power to a bonâ
" fide purchaser who has no notice of the act
" of bankruptcy, the purchaser may hold the
" property as against the trustee. It is obvious
" that a power of attorney is not revoked for
" all purposes by an act of bankruptcy com-
" mitted by the giver of the power, because, if
" no adjudication follows, a sale under the power
" is binding on the giver himself; and whenever
" a sale would be binding on a bankrupt if no
" adjudication follows, it is binding on the

" trustee under a subsequent adjudication if " the purchaser had no notice of an act of " bankruptcy having been committed by the " seller at the time of the sale." Their Lordships think that this principle applies to the authority in this case, a payment having been made in pursuance of it, which became a debt in a mutual account within the scope of the 39th section; the reasons which induced the Court to hold that the power was not revoked in the case referred to apply with equal force to the case of such a debt.

Their Lordships do not decide this case upon the ground that there was a credit before the act of bankruptcy which matured into a debt after it, but upon the grounds that the authority given by the bankrupts to the Defendant to receive the money was unrevoked at the time he received it; that it was therefore a rightful payment to him; that being so received, it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy; and that he is entitled to set off against it, in the action brought by the assignees, the debt due from the bankrupt to him.

Their Lordships think it unnecessary to give any opinion upon the point whether the transaction is a disposition of property protected by the 95th section of the Act, sub section 1. If the transaction had been an isolated one, they might have had to consider that point; but the sum in dispute being an item in a mutual account between the parties, they think the case falls within the 39th section.

Leave having been given by the learned Judge to the Defendant to move to enter the verdict, their Lordships are of opinion that the verdict and judgment should be entered for the Defendant. They could not advise this order, in the

face of the verdict of the jury upon the third question, if it had really been a finding of fact; but it being a mere conclusion of law, which they were directed to find by the Judge, their Lordships do not think that it stands in the way of their advising the verdict to be entered according to what they consider to be the right conclusion of law from undisputed facts.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court discharging the rule, and in lieu thereof to order that the rule be made absolute to enter the verdict and judgment for the Defendant, with costs. The Respondent must pay the costs of this Appeal.