Judgment of the Lords of the Judicial Committee of Her Majesty's Privy Council on the Appeal of William Henry Willans and others v. *Sir Henry Ayers and others, from the Supreme Court of South Australia; delivered* 10*th December,* 1877.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE question raised by this Appeal is whether the Appellants ought to have been allowed to prove against the estate of Messrs. Philip Levi and Co., when in the course of administration as an insolvent estate in the Colony of South Australia, a sum of 4,000*l.*, under the head of re-exchange, in addition to the sum for which they had been admitted to rank as creditors.

In and previous to 1866, the Appellants, carrying on business in London as wool-brokers, under the style of Willans, Overbury, and Co., had large dealings with Philip Levi, Edmund Levi, Frederick Levi, and Alfred Watts, who were merchants carrying on business in partnership both at Adelaide, in South Australia, and in London, under the style of Philip Levi and Co.

According to the course of dealing between the two firms, Willans, Overbury, and Co. were in the habit of accepting bills drawn by Philip Levi and Co. against wools to be consigned by them, the amount of such acceptances being regulated by the assumed value of the clip of a particular year;

Philip Levi and Co. being, moreover, under engagement to keep Willans, Overbury, and Co. out of cash advance in respect of their acceptances.

In the month of May 1866, and during the commercial panic and crisis of that year, a considerable balance was due from Philip Levi and Co. to the Appellants in respect of former transactions; and the latter had also to meet acceptances, which would fall due at various dates between the 25th May and the 23rd June, amounting in the whole to 37,000*l.*; there being, as was then estimated, a deficiency in the value of wools against which those acceptances had been given of no less than 25,000*l.*; and the London house of Philip Levi and Co. having no other present means of putting the Appellants in funds.

In these circumstances the Appellants agreed to give further accommodation to Philip Levi and Co. upon certain terms which were finally embodied in the Agreement of the 26th May, 1866, which is set out at page 25 of the Record. That document purports to be made between Philip Levi and Alfred Watts, of Adelaide, Frederick Levi and Edmund Levi, of Charlotte Row, in the City of London, merchants and copartners, trading under the style of Philip Levi and Co., and the Appellants. It contains various stipulations for the protection and security of the Appellants; but the only one that is material to the present question is the third, which is in these words: "That at the request of the said Willans, Overbury, and Co. the said Frederick Levi and Edmund Levi shall draw from time to time bills of exchange upon the said Philip Levi and Alfred Watts, for acceptance and payment by them, for such amount and at such dates as the said Willans, Overbury, and Co. shall require and think fit to cover the said sum of 20,000*l.*"

Accordingly the Appellants paid their acceptances as they fell due, charging Philip Levi and Co. in account with the amount; and, on the other hand, the London partners of Philip Levi and Co., in pursuance of the above clause in the Agreement, drew four bills of exchange for 5,000*l.* each. All of these purported to be drawn by Philip Levi and Co. in London, upon Messrs. Philip Levi and Co., Adelaide, to the order of Willans, Overbury, and Co. Two bore date the 24th of May, 1866, and

were, the one at 60, the other at 90 days' sight. The other two were dated the 1st of June, and were both at 90 days' sight. Philip Levi and Co. were credited in their account current with the Appellants with the amounts of the four bills, less certain sums aggregating 2,350*l.*, which were calculated, in the case of the 60 days' bill, as "exchange at 11 per cent.," and in the case of the other bills, as "exchange at 12 per cent." After receiving credit for these sums, Philip Levi and Co. remained indebted to the Appellants on the balance of their account current, as made up to the 30th of June, 1866, in the sum of 24,952*l.* 16*s.* 3*d.*

The four bills, after an ineffectual attempt to negotiate them in London, were sent by the Appellants out to Australia, where they were all dishonoured. The May bills were accepted, but not paid. The others were neither accepted nor paid. All were duly protested, and apparently were, after dishonour, returned to the Appellants in England.

The Adelaide firm of Philip Levi and Co. stopped payment about the 12th of September, 1866, and it may be taken that, under and by virtue of the three deeds dated respectively the 17th of September, 1866, the 23rd of February, 1867, and the 31st of January, 1868, which are set forth in the Record, the joint and separate estates of all the partners in the firm, whatsoever and wheresoever, became vested in the Respondents, for the purpose of being distributed for the benefit of their creditors, as provided by the Australian Statute, intituled, "The Insolvent Act, 1860." There was afterwards litigation between the Appellants, claiming as secured creditors, and the Respondents, the Trustees, but this was finally compromised by an Agreement in writing dated the 11th of August, 1873, whereby it was arranged that the Appellants should rank as creditors on the estate of Philip Levi and Co. for 34,733*l.* 8*s.* 10*d.*, and for interest on current account up to the 17th of September, 1866, with liberty to make further proof touching certain commissions claimed by them which are no longer in dispute; and also, "to apply to the Court of Insolvency to be allowed to prove in respect of the re-exchange charged by them; with an appeal from the decision of the Court of Insolvency to the Supreme Court, or

any other Appellate Tribunal having jurisdiction in insolvency, in manner provided by the laws of insolvency."

Accordingly the Appellants did apply to the Court of Insolvency, praying, amongst other things, that the Trustees might be ordered to pay them a dividend on 4,000*l.*, the amount of the sum claimed for re-exchange on the four dishonoured bills for 5,000*l.* each. Their claim was, however, rejected by the Commissioner in Insolvency, and his decision was, on appeal, confirmed by the Supreme Court by an Order dated the 19th of December, 1876. Against the latter Order the present appeal is preferred.

In the course of the argument before their Lordships, an objection was taken to the Appellants' claim, which it is convenient to consider *in limine*. It was suggested that, inasmuch as by the original contract the Appellants were to receive their money in Adelaide, and did ultimately receive there what was recoverable in respect of the bills, there can be no foundation for a claim for re-exchange. To this it was answered that the place in which the estate of the insolvents was administered was determined by their own act in executing the Trust Deeds, and thereby vesting all their assets, wheresoever situate, in trustees in Adelaide; that the rights of the creditors of the London house could not be diminished by their being thus compelled to follow the assets, English as well as Australian, to Australia; but that they were entitled to rank as creditors for whatever they might have proved against the London house under a bankruptcy in London.

Their Lordships are disposed to accede to this argument. On the other hand, it is now admitted that, by the law of South Australia, there can be no proof, in respect of re-exchange or otherwise, for damages unliquidated at the date of the insolvency, and consequently it lies upon the Appellants to establish that, by virtue of a special custom peculiar to the trade between London and Australia, and recognized in London as qualifying the General Law Merchant, the Appellants, upon the dishonour of the bills, or at least upon their return to London, were entitled, as against the drawers, to add 20 per cent. as a liquidated sum to the amount of those bills, and thus became, *ipso facto*, creditors of the

London house of Philip Levi and Co. for 24,000*l.*, instead of 20,000*l.*

To this somewhat startling conclusion various objections have been taken. They are thus summarized by the first three of the Reasons submitted by the Respondents' case, which are as follows:—

1. Because the four instruments alleged to be bills of exchange are not bills of exchange so as to entitle the holders to claim re-exchange upon their dishonour.

2. Because the custom relied upon by the Appellants is invalid, does not exist in fact, and is bad in law.

3. Because, even if it is good and valid, it does not extend to bills of exchange taken under such circumstances as existed with reference to the four instruments in question.

If the first of these objections be founded, as their Lordships take it to be, on the broad fact that the drawers and drawees of the alleged bills are the same persons, and consequently that the documents are not in the strict and proper sense of the term bills of exchange, but rather of the nature of promissory notes (a consideration upon which the Supreme Court seems mainly to have proceeded), their Lordships are not prepared to dispose of this Appeal upon that ground. The circumstance in question, as will subsequently be shown, may have some influence on their decision; but it does not, in their opinion, constitute in itself a complete or sufficient *ratio decidendi*. There is no doubt some authority for the proposition that such instruments are in strictness rather promissory notes than bills. But the passage cited from Pardessus ("Cours de Droit Commercial," Tom. ii, Art. 335) shows that the French law makes a distinction where the document purports to be a bill drawn by a house of business in one country upon a house of business in another country, and would treat it as a bill of exchange, notwithstanding the identity of the persons carrying on business in the two establishments. And in this country there are authorities to show that although the holder of such an instrument may at his election treat it as a bill of exchange, or as a promissory note, the drawer might be estopped from alleging that it was not a bill of exchange upon the principle applied to

foreign scrip in Goodwin *v.* Roberts, L. R., 1 House of Lords Appeal Cases, 476, see p. 490. Nor does it seem to be essential that the holder should be a subsequent indorsee for value. The same rule may well apply to the original parties, if it be clear on the evidence, as it is here, that it was the intention of the one to give, and the other to receive, a document capable of being negotiated as a bill of exchange in the market.

Then what is the alleged custom upon which Appellants rely, and what the proof of its existence?

The first statement of the custom is to be found in the following passage in the first affidavit of the Appellants, at p. 7 of the Record:—

"We are informed and believe that at a meeting held in May 1846 of the New South Wales and Van Dieman's Land Commercial Association, which was a body of merchants engaged in trade with Australia, associated for the purpose of considering questions connected with such trade, a report of the Committee was read, which contained the following passage:—'The very great importance of having an established custom in the trade as to a fixed percentage for exchange, re-exchange, and interest in cases where bills may be returned from the Colonies dishonoured, early occupied the attention of your Committee, and it appearing to them that 20 per cent. would be a fair and equitable consideration to cover all contingencies, they recommended its adoption to the members through a circular issued by the Secretary, and the subscribers having approved the measure, confirmed the same by affixing their signatures to a copy of the Resolution of the Committee to that effect,' and that the said report was adopted."

So far the alleged custom would appear to have been established only since 1846, and to have originated in the act of an Association whose authority in effecting an alteration of the Law Merchant of this country could bind only those who had agreed, in the manner stated or otherwise, to be so bound.

In some of the other affidavits, as, *e.g.*, in that of Mr. Taylor, the Managing Director of the Bank of Victoria, at p.13; and in that of Mr. Henry Monks, the Secretary of the English, Scottish, and Austra-

lian Chartered Bank, at p. 14; nothing is said of the Resolution of the Committee. The latter states broadly :—

"It is now, and was in the year 1866, and for many years previously had been, a well-known and thoroughly established custom that the holder for value of bills drawn in England upon any place in any of the Colonies of Australia was entitled to claim from the drawer of such bills, if they were eventually returned dishonoured either for non-acceptance or non-payment in Australia, in addition to the amount of such bills, a certain liquidated amount or fixed per-centage in lieu of re-exchange and other charges; and further, that throughout the year 1866 the commission or liquidated damages so payable, in the absence of a special agreement fixing the rate, was 20 per cent. on the amount thereof, and was so fixed by invariable custom and usage of the parties engaged in the Australian trade."

Mr. Purdy, however, the Manager of the Bank of South Australia, states (p. 19) that the fixed rate of re-exchange has, since 1866, been reduced to 10 per cent. (he does not say when or how); a reduction which implies an authority somewhere to vary, at least as to amount, what is elsewhere stated to be "a fixed and invariable custom and usage."

Other witnesses, as, *e.g.*, Mr. Graham, at p. 16, and Mr. Sichel, at p. 32, depose that the same custom obtains in Australia with respect to bills drawn in Australia upon England, and returned thence dishonoured.

To the custom thus stated, it is objected that it is bad in law because inconsistent with the nature of re-exchange; and that evidence is not admissible to prove an unexpressed condition which is inconsistent with what is either expressed or implied by law in the contract. And as authorities in support of this proposition, the Judgment of Mr. Justice Blackburn in Burges *v.* Wickham, 3 Best and Smith, 696-7, and the decision in Suse *v.* Pompe, 8 C. B., N. S. 538, were cited. In the latter case, wherein the nature of re-exchange and of the right to it was very clearly explained by Mr. Justice Byles, it was ruled that the Court could not act on evidence of an alleged custom, to the effect that the holder of a dishonoured bill might at his option claim either

the sum which he had paid for the bill, or re-exchange computed in the usual way, from the drawer. It was further urged that although what is termed re-exchange may comprise expenses of protest and other charges which may be constant quantities, it must at least vary with the current rate of exchange; whereas, under the custom set up, the drawer of a bill in London and the drawer of a bill in Australia would have to pay the same fixed percentage by way of penalty on the dishonour of his bill, although the bills were dishonoured on the same day, when the rate of exchange, if in favour of the one country, would necessarily be against the other. Their Lordships are by no means prepared to say that there is not considerable force in these objections. Looking, however, to the fact that in other countries, and notably in America, the practice of allowing a fixed sum by way of liquidated damages, in lieu of re-exchange calculated in the ordinary way, has been recognized by the Courts, even where it depended on usage, and had not been sanctioned as in some of the United States it has been by statute; looking also to the fact that in Auriol *v.* Thomas, 2 Durn. and East, Mr. Justice Buller appears to have recognized such a custom in the case of East India Bills as unobjectionable; their Lordships are not prepared to pronounce the alleged custom invalid in law on the face of it. Whether its existence has been satisfactorily proved is another question.

Upon this point their Lordships cannot say that the evidence before them establishes the existence of a custom varying the General Law Merchant, in a manner altogether satisfactory to their minds. The Record no doubt contains the affidavits of a good many persons of respectability, all of whom concur in stating that the alleged usage exists in the case of trade bills of exchange. None of these persons, however, have been subjected to cross-examination; a process peculiarly desirable where the thing to be proved is invariable or even general usage or custom. Their Lordships do not doubt that the so-called custom has been voluntarily acted upon in many instances, but they have not been referred to any case in which it has been found by a jury, or recognized by a Court of Justice, as an established usage of trade, varying the General Law

Merchant. Their Lordships, however, do not feel compelled either to affirm or to disaffirm, by their decision in this case, the existence of the alleged custom, or its validity in law, because they have come to the conclusion that, if it exists, it has not been shown to govern a transaction such as that which is here in question.

The Appellants had to satisfy the Court that at the date of the insolvency they had a right to add 4,000*l.* to the amount of the bills, by reason of the right to re-exchange at the customary rate being necessarily an implied incident in their contract with the insolvents as drawers.

It is to be observed, however, that there is a conflict of evidence even amongst the witnesses who came to depose to the existence of the alleged custom upon this point. Some of them, and these from their position as Bank agents are of considerable weight, limit its application to bills of exchange drawn in the usual form and in the ordinary course of trade, and deny that it applies to the documents and transactions in question. On the other hand, the greater number of the witnesses assert the contrary. It was said at the Bar that these discrepant statements were mere matters of opinion. That may be true, but the conflict at least shows that the custom is not universally admitted by those engaged in or conversant with the trade between England and Australia, to apply invariably to every document that assumes the form of a bill of exchange.

Their Lordships are of opinion that the distinction taken by the witnesses who impugn the Appellants' right is reasonable and in itself decisive of the case.

If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to "re-exchange," which is the measure of those damages.

In the present case the Appellants, having no occasion to transfer money from London to Adelaide, but seeking, on the other hand, to be put in

funds by Philip Levi and Co. in London, take from the latter certain instruments, which they might at their option (and their right cannot be put higher) treat as bills of exchange or as promissory notes. Failing to raise money on these in London, they, according to their own account, send them out to Adelaide, in the hope of being able to negotiate them there, not, however, for the purpose of employing the proceeds there, but of having them remitted to London. If the documents are to be treated as promissory notes, there is, of course, no right to re-exchange. But let it be assumed that by the contract between the parties they were to be treated, even whilst they remained in the Appellants' hands, as bills of exchange. If so, failure to accept might have remitted the Appellants to their original rights against Philip Levi and Co., and enabled them to pursue at once the remedies which had been suspended by taking the bills. But it appears to their Lordships that, in the peculiar circumstances of this case, the dishonour of the bills did not entail upon the Appellants damages to the liquidation of which the custom was intended to apply.

It is, of course, unnecessary to consider what would have been the consequences of the negotiation of the bills in this country; whether the holders might have acquired a right to re-exchange against the Appellants as indorsers, and whether the Appellants might have had a remedy over against Philip Levi and Co. as drawers. There was no such negotiation; the bills remained in the Appellants' hands, and, in order to establish their case, it is necessary to make out that the consequence of re-exchange at the customary rate was in the contemplation of the parties at the time of the contract; or, in other words, that Philip Levi and Co. contracted that, in the event of the dishonour of the bills by their Adelaide firm, they would allow that re-exchange, by way of penalty, as an item in their account with the Appellants, thus increasing the amount for which the bills were given by 4,000*l.*

Of such an agreement on the part of Philip Levi and Co. there is no direct proof, and their Lordships have already shown that it is not, in their opinion, necessarily to be inferred from the form

of the documents, the circumstances of the case, or the evidence of the custom, whatever may be the weight to be attached to the last.

They will, therefore, humbly advise Her Majesty to affirm the Order of the Supreme Court of South Australia, and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—17/12/77.