Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barclay (Registered Public Officer of the Commercial Bank) v. The Bank of New South Wales, from the Supreme Court of New South Wales; delivered February 12th, 1880.

Present:

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Plaintiffs in this case are the Commercial Bank in Tasmania, suing by their public officer, and the Defendants are the Bank of New South Wales. The questions in this Appeal arise solely upon demurrers to pleas and replications, and their Lordships therefore have only to deal with what appears on the face of the pleadings. The first count of the declaration is to this effect: "That one Armstrong had shipped from Hobart "Town, in the said colony of Van Diemen's Land, "certain goods to Messrs. Brown and Son at "Sydney, and had drawn against the same a "bill of exchange on the said Messrs. Brown "and Son for the sum of 250*l.*, and annexed "thereto the bill of lading of the said goods, "and endorsed the same, and the said bill of "exchange to the said Commercial Bank, in order "to procure an advance by the said Bank against "and on the security of the said bill of exchange "and bill of lading, and retained and employed "the said Bank for reward to them in that behalf "to collect the said bill of exchange, and to receive "payment of the same in Sydney from the said "Messrs. Brown and Son, and upon such payment

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" and not otherwise to deliver the said bill of " lading to the said Messrs. Brown and Sons." Then the Plaintiff avers: " That thereupon, in " order to carry out such retainer and employ- " ment, the said Commercial Bank endorsed and " transmitted to their agents in Sydney (the " Defendants having notice of the premises) the " said bill of lading and bill of exchange, and " for reward to the Defendants in that behalf " retained and employed them to present for " acceptance and to collect the said bill of " exchange, and receive payment thereof from " the said Messrs. Brown and Son, and upon such " payment and not otherwise to deliver the said " bill of lading or goods to the said Messrs. " Brown and Son, and the Defendants received " the said bill of lading and bill of exchange, " and accepted the said retainer and employ- " ment." The declaration avers that all conditions, &c. were performed, and the breach is thus stated:—" Yet the Defendants, contrary " to their agreement and duty in that behalf, " without obtaining payment of the said bill of " exchange, delivered the said bill of lading to " the said Messrs. Brown and Son, whereby they " were enabled to and did obtain possession of " the said goods without payment of the said " bill of exchange, and the same has hence " hitherto remained unpaid, and by means of the " premises the said goods became wholly lost to " the said Commercial Bank and to the said " H. F. Armstrong, and the said Commercial " Bank incurred divers large costs and expenses " in and about defending an action which thereby " accrued to the said H. F. Armstrong against " the said Commercial Bank, and were com- " pelled to and did pay a large sum to the said " H. F. Armstrong as damages sustained by him " by reason of the loss of the said goods as " aforesaid." There are several other counts, the

same substantially as this, having reference to different bills of exchange, and to these counts several pleas were pleaded, that on which the main question has been raised being the sixth plea, pleaded to the first, second, third, fourth, and fifth counts, which runs thus:—"The Defendants say "that after the alleged receipt of the said bills "of lading and bills of exchange by the "Defendants, and the alleged retainer and "employment of the Defendants as in the said "counts respectively mentioned, a dispute arose "between the Defendants and the said Com-"mercial Bank"—their Lordships here observe that it is not stated whether the dispute arose before or after the breach complained of—"as to "the liability, contingent or otherwise, of the "Defendants to the said Commercial Bank for "any loss which might arise or happen to the "said Commercial Bank in respect of the said "bills of lading and bills of exchange in the "said counts respectively mentioned; and it was "thereupon agreed between the Defendants and "the said Commercial Bank that, in consideration "of the Defendants crediting the said Commercial "Bank with the amount of the said bills of "exchange in the said counts respectively "mentioned, the said Commercial Bank should "transfer to the Defendants all their right to "the same, and all their remedies thereupon as "against the acceptor or drawer, and also all "their right to the goods comprised in the said "bills of lading, and all their rights and remedies "for the recovery of the same, and also all their "rights and remedies against the captain and "owners of the vessels mentioned in the said "bill of lading for non-delivery of the goods "comprised therein respectively according to "the tenor and effect of the said bills of lading; "and the Defendants say, that thereupon they "did credit and thereby pay to the said Com-

" mercial Bank the full amount of the said bills " of exchange, and the said Commercial Bank " did transfer to the Defendants all their rights " and remedies as aforesaid, and endorsed the " said bills of exchange and bills of lading to the " Defendants. And the Defendants further say, " that subsequently they, as holders for value of " the said bills of exchange, sued the said " H. F. Armstrong, as drawer of the said bills of " exchange, upon the said bills of exchange in the " second, third, fourth, and fifth counts respec- " tively mentioned, and recovered judgment upon " the same against him in this Honourable Court; " and thereupon the said H. F. Armstrong sued the " said Commercial Bank for the amount paid by " him under the said judgment. And the De- " fendants say, that the amount paid by the said " Commercial Bank to the said H. F. Armstrong, " in settlement of the said action and the costs " thereof, are the costs, expenses, and damages " referred to in the said counts respectively, and " that such costs, expenses, and damages arose in " respect of the said bills of exchange so trans- " ferred and endorsed to the Defendants as " aforesaid, and the full amount of which was " duly paid to the said Commercial Bank by the " Defendants in pursuance of the said agree- " ment, and not otherwise."

This plea was demurred to on the ground that it was not a good plea in accord and satisfaction, or indeed in any other view. Two of the learned Judges below have held that it was a good plea in accord and satisfaction. It is true that Mr. Justice Hargrave expresses himself somewhat doubtfully upon this point, and appears to think that possibly it is something more, but perhaps it may be taken that he does not substantially differ from Mr. Justice Faucett, who is of opinion that the plea amounts to a good plea of accord and satisfaction. The

Chief Justice is of opinion that the plea is bad. The plea alleges a certain agreement to have been come to between the Plaintiffs and Defendants after certain disputes arose. In terms it does not admit, nor does it deny, the breach which is alleged in the declaration. It does not in terms state that the agreement set out in the plea was accepted by the parties in accord and satisfaction of the causes of action in the declaration mentioned, but it has been argued that the plea upon the whole of it must be construed as meaning this. It has been also argued that it may be construed in a totally different manner, namely, as substituting an agreement for the original agreement set out in the Declaration; but inasmuch as this latter contention has not been insisted upon, their Lordships will confine themselves to considering whether it does amount to a plea in accord and satisfaction.

It appears to their Lordships that the agreement set out in the plea does not necessarily, and on the face of it, amount to an accord and satisfaction; but that it is consistent with this agreement that it may have been come to, and yet that the Plaintiff may not have intended to accept it in accord and satisfaction of the causes of action stated in the declaration. The only ground on which it can be plausibly argued that the agreement must, on the face of it, be taken to be in accord and satisfaction, is the assumption that in any event the Commercial Bank could not obtain more than the value of the bills of exchange, and that that value is stated to have been paid. But their Lordships are of opinion that it cannot be taken, upon the proper construction of the counts to which the plea is pleaded, that no damages could have arisen from the breach of contract on the part of the De-

fendants beyond the sum of money for which the bills were drawn, although it may possibly be that no greater damages may be given in the trial by a jury. It appears to their Lordships impossible to say, as a matter of law, that in consequence of the Defendant's breach of this agreement, admitted as it is by the plea, in allowing Brown and Co. to obtain possession of the goods without payment of the bills of exchange, no further damage can have accrued to the Plaintiffs than the mere value of the bills of exchange. That being so, the agreement, on the face of it, does not appear to be an agreement necessarily in accord and satisfaction. Undoubtedly it might have been accepted in accord and satisfaction; but there is no allegation in the plea that it was so accepted, and their Lordships cannot help thinking that the allegation is purposely omitted—at all events, it cannot be imported into the plea.

Their Lordships must observe that they cannot agree with the view expressed by Mr. Justice Faucett, who observes: "I at first "thought that this plea did not amount to a "plea of accord and satisfaction, because it "contained no express statement to that effect, "and therefore that it went merely to damages. "But, as the whole matter rested on written "communications, I think the effect of these "written communications has been properly "left to be determined by the Court." It appears to their Lordships that such is not the effect of the plea. It does not set out written communications the effect of which may be determined by the Court. It sets out no written communications at all, but professes only to give the Defendant's version of a certain agreement which the plea does not even aver to have been in writing. If the letters which constituted the agreement had been set out, it

might have appeared on the face of them that they constituted an agreement which might be taken as one in accord and satisfaction; but, inasmuch as they have not been set out, that cannot be assumed.

On these grounds, their Lordships are of opinion that this plea is bad. It has been admitted on both sides that there is substantially little distinction between the first count and the second, third, fourth, and fifth counts, and that the seventh and 10th pleas substantially stand or fall by the argument in support of or against the sixth plea. The same appears to their Lordships substantially to be the case with respect to the 14th plea, which is pleaded to the eighth count. The demurrer to the 12th plea has been abandoned, and the matter therefore stands thus: that in their Lordships' view the judgment appealed against is wrong, in as far as it directs that judgment be entered for the Defendants upon the Plaintiffs' demurrers to the Defendants' 6th, 7th, 10th, and 14th pleas; and that such judgment should be entered for the Plaintiff.

That being so, no question arises with regard to the replication of the Plaintiff, which is also demurred to on the part of the Defendant, and in respect of which it follows that the Plaintiff would be entitled to judgment.

For these reasons, their Lordships will humbly advise Her Majesty that the judgment below be reversed as far as it relates to entering the judgment for the Defendants upon the demurrers to the 6th, 7th, 10th, and 14th pleas, and also upon the demurrer to the Plaintiffs' replication to the 6th, 7th, 10th, and 14th pleas, and that the judgment be entered for the Plaintiff upon those pleas, and the replication to them; the costs, as usual, to follow the result.