

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the appeal of Adams
and another v. Nicholls and another, from
the Supreme Court of the colony of the
Cape of Good Hope; delivered, Thursday,
March 4th, 1875.*

Present :

SIR JAMES W. COLVILLE.

SIR MONTAGUE E. SMITH.

SIR HENRY S. KEATING.

THIS is a suit brought by the official liquidators of a bank at Graham's Town in the Cape Colony, called the Frontier Commercial and Agricultural Bank of Graham's Town, against Messrs. Alfred and William Adams, who are merchants in London, upon an agreement or undertaking given by them to the bank upon a compromise made by the bank with one of their customers, Mr. Locke.

It appears that Locke carried on business as a general merchant in the colony. Messrs. Adams and Co. had large transactions with Locke. They consigned goods to him, and he also shipped produce to them against advances which they made to him from time to time. Locke was indebted to the bank of Graham's Town at the time of the agreement in question to the amount of about 34,000*l.*, and was still more largely indebted to Adams and Co., what was due to them exceeding 62,000*l.* according to the accounts as explained at the bar. In this state of things Mr. William Adams happened to be in the colony, and it appears that he interested himself in getting a compromise made between Locke and the bank.

The compromise was to consist of a considerable reduction on the part of the bank of the debt due to them from Locke, and Mr. Adams was on the part of his own firm to make a large reduction from the balance due to that firm. It appears that an agreement was made between Mr. Adams and the bank which has given occasion to the present action, and that agreement was ratified by the Court, its sanction being necessary as the bank was in liquidation. The agreement of Adams and Co. is contained in a letter written by Mr. William Adams on the part of the firm, and also in an order of the Court. The letter indeed bears date two days after the order. Previous to that order, a letter had been written by Locke to the bank which is referred to in it. That letter states rather more fully than the order or Mr. Adams' letter the details of the compromise. Locke's letter is dated the 10th November 1869, and is addressed to the liquidators. He says:—"I enclose a statement of my liabilities and assets, by which you will note that my liabilities exceed my assets by 15,796*l.* 3*s.* 4*d.* I have therefore to communicate my inability to pay my creditors in full, owing to the heavy and severe losses I have sustained in business during the last four years and the present depressed state of trade. Messrs. W. J. and A. Adams of London, merchants, are unsecured creditors for an amount nearly equal to that of the bank;"—therefore their unsecured debt appears not to have been so large as that of the bank;—and they have consented not only to accept a compromise, but to continue their support should you be willing to entertain a compromise. One of the partners, Mr. W. J. Adams, is now in the city, to whom I beg to refer you on this subject. I therefore propose, that in consideration of being released from the bank's recurrences on bonds, bills of exchange, notes,

“ and securities held by it, to pay you in dis-
 “ charge of the claim of the bank against me
 “ the sum of 5,000*l.* (say 5,000*l.*), in four equal
 “ instalments, at six, twelve, eighteen, and
 “ twenty-four months without interest from the
 “ date that this offer is accepted, by my pro-
 “ missory notes in your favour.” His proposal
 was that he should be released from the bank's
 recurrences on various securities which they
 held, upon giving them the notes for 5,000*l.*, and
 making some other payments which it is not
 necessary to refer to. The letter contains the
 following passage:—“ Should you entertain this
 “ offer, I shall be enabled at once to resume
 “ business under the continued support of
 “ Messrs. W. J. and A. W. Adams, and also be
 “ able to meet any calls that you may make on
 “ shares registered in my name.”

The order of the Court containing the
 undertaking of Messrs. Adams and Co., after
 a recital of the proposed compromise, is in
 these terms:—“ Now, therefore, this Court having
 “ this day heard the parties thereto, and in
 “ consideration that William James Adams has
 “ undertaken to the official liquidators aforesaid
 “ that the goods now under his order for and on
 “ account of the said John Locke to the amount
 “ of about 10,000*l.*, and such further goods as
 “ may be ordered on similar account within
 “ twelve months shall be delivered to the said
 “ John Locke without the said William James
 “ Adams or his firm of W. J. and A. W. Adams
 “ taking any preferent security; and in con-
 “ sideration that he also undertakes not to
 “ withdraw his support or that of his firm from
 “ the said John Locke for the same period of
 “ time, doth sanction that the said official
 “ liquidators be authorized to agree to the
 “ following arrangements.” The first is, “ That
 “ the debt of the said John Locke, amounting to

“ the sum of 34,171*l.* 4*s.* 7*d.*, be compromised
“ in terms of the letter of the said John Locke
“ to the official liquidators, dated Graham’s Town,
“ 10th November 1869.” This order of the
Court is dated on the 15th January 1870, and
on the 17th of the same month Mr. Adams wrote
to the official liquidators an undertaking in the
terms of the order.

One part of the undertaking was that the
goods “ now under order,” which were represented
to be to the amount of 10,000*l.*, should be
delivered without any preferential security being
given for them. This was a material statement
in the obligation of Mr. Adams, for in coming
to the arrangements which they did the bank,
evidently, may have been influenced by the
fact that so large a consignment as goods to
the value of 10,000*l.* were actually under order.
They might very well suppose that if Messrs.
Adams had at that time orders to this extent
which they were willing to execute, it would be a
very good commencement of the new state of
things upon which Locke was entering. Un-
fortunately it turns out that it was not a true
statement. It was made not only to the
liquidators, but to the judge who sanctioned
the arrangement; and there can be no doubt
that instead of goods to that value being ordered,
goods to only about half of that amount were
really under order from Locke. The evidence
of that is as clear as can be, because it is found
in a letter written by Mr. Adams to Locke on
the day on which the order was made. Mr.
Adams says in this letter, “ I am glad to say
“ that after a severe tussle with Fitzpatrick
“ your compromise has been carried through
“ on my undertaking on behalf of my firm
“ to support you for the next twelve months
“ (dam fools, as if I was not sure to do
“ it), and that I would execute all orders you

“ sent. I accidentally stated orders on the way
“ amounted to 10,000%. (this I know is about
“ double what you sent for), and that all orders
“ from you in the twelve months I would ex-
“ cute.” Now this was certainly a very gross
mis-statement, and when Mr. Adams says it was
accidentally made, one scarcely can give him
credit for using that word in its ordinary sense.
When he knew, as he must have known, that the
statement was untrue, the accident, if it were
one, should have been corrected at once; but he
does not do that. He leaves the liquidator and
the judge under the impression that his state-
ment was true, and under that impression the
liquidators come to the agreement and the Court
sanctions it.

It is said Mr. Adams might have thought that
having obtained the order it was too late, after-
wards, to correct his statement; but when he
had a later opportunity, it is certainly to be
regretted that he did not avail himself of it.
The mis-statement having been made on the
15th, when in the letter of the 17th he writes
to the liquidators stating what the arrangement
is, he repeats it, and in a way which rebuts
any presumption that it could then have been
accidentally done.

Their Lordships entirely yield to the argument
of Mr. Miller, that this mis-statement gives
no direct support to the cause of action in the
present suit; but when their Lordships have to
consider, in the way of evidence, the intention
of the parties in the subsequent transactions,
it certainly is not immaterial to bear in mind
the mis-statement with which the arrangement
originated, and the concealment from the bank
and the Court that was then practised.

The arrangement being made, it appears that
goods were sent forward, and it may be taken
that the total value of all the goods sent under

orders from Mr. Locke amounted to about 13,000*l.*, and that these consignments went on from the time the agreement was made to the month of August. It is, however, to be observed that the whole of these consignments amount only to 13,000*l.*, or about 3,000*l.* of goods beyond the value stated to be under order; and it certainly appears that the transactions must soon have become restricted.

The declaration is founded upon the agreement, and of course no breaches can be assigned which it will not sustain. The breaches assigned are, first, that goods ordered by Locke and forwarded to his order were, in fact, not delivered to him, but on the contrary taken possession of by the Defendants or one of them, or some other person for them; secondly, that the firm "did not continue their support to the said John Locke during the twelve months next after the said 17th of January, but, on the contrary, withdrew their support." There is a third breach, that they took preferent security to a very large amount.

Now with regard to the first breach there certainly does not seem to be evidence that any large orders actually sent by Locke were refused, but there is evidence that some small orders sent by him were not executed in the way in which he intended them to be. He says in his evidence,—“The consignment there mentioned was of goods ordered by me under the arrangement with the liquidators that the Defendants were to send what I ordered. The bill of lading was, I believe, in my name, but the Home firm sent it to Edinboro' & Co. to give me or withhold, they sent the papers to me to get the goods at East London. I believe the bill of lading was in my name, but I cannot remember, the goods were not sent as per order, but to sell on commission. It

“ was a small shipment of about 60*l*.” Undoubtedly, if you take what he says literally, he had sent an order for the goods to be consigned to him in the ordinary way, which were not so consigned, but were sent to him on commission.

He says again, referring to goods ex Elaine, and giving an extract from Adams & Co.'s letter—“ ‘ Will send invoice ex Elaine in a different form, as if from London.’ These goods “ were ordered by me, which Adams changed “ into a consignment to me.” There is also a letter in which Mr. Adams says, writing from London, that orders are cancelled. There is no doubt very little explanation of those transactions, but it is difficult to say that there is not some evidence in what I have just alluded to of a refusal in certain cases to execute orders.

Their Lordships, however, would be sorry to decide a case of this importance upon those cases, inasmuch as they really are not fully explained; but those transactions show considerable hesitation, at the least, on the part of Adams and Co., to send out goods to Locke in the ordinary way.

Upon the part of the agreement which is in these words, “ without the said James Adams or “ his firm of W. J. and A. W. Adams taking any “ preferential security,” a question of construction arises. On the one side it is said by Mr. Miller it means only they shall not take preferential security in respect of the goods ordered and consigned; on the other side it is said to be an independent stipulation that they would not on any account take preferential security. There is some ambiguity in the documents, particularly in the letter, but in their Lordships view it is not necessary to say which construction is the correct one. It may be that Mr. Miller has put the true construction upon the

words, and it would certainly seem to be most consistent with the grammatical construction of the sentence.

Their Lordships think it unnecessary to decide this, because they are of opinion that if preferential security was in fact taken for the old debt or for previous and not present advances, that would be a breach of the other part of the undertaking, that the firm would not withdraw their support for the period of twelve months. It is obvious that those words must have a meaning beyond that contained in the first obligation. The first undertaking is that they would deliver the goods which were ordered without taking preferential security; but then, as an independent stipulation, comes the obligation that they will not withdraw their support for twelve months. Those words undoubtedly are large, but it would not be a correct construction to hold that they were under all circumstances to support a falling man by the advance of money. They are terms of business which a jury would understand, and which the Court, sitting as a jury, must construe as the jury would have done. The undertaking clearly means something. Then, what does it mean? It surely means that they would do their best, according to the ordinary manner of a merchant in London transacting business with a correspondent in the colony, to keep Locke afloat. They not only were consigning goods to him, but he was consigning produce to them, upon which they made advances; and they were bound to support him in this business, not to the extent of making him reckless consignments or advances, but to a fair and reasonable extent.

It should always be borne in mind that Adams & Co. wished to keep Locke in business, and were ready to trust him, when the bank wanted to stop him; and that it was upon their under-

taking to support him, the bank did not make him bankrupt, and accepted the compromise.

With regard to this question of preferential security, it must be obvious that if Adams & Co. really did take security, not to secure a present advance to enable Locke to go on with his business, but a past debt or an old balance, they would be taking so much out of his business, which would be, in effect, a withdrawal of support. You cannot take away part of a man's assets required for his trade without withdrawing the means by which alone he can support it; and therefore by withdrawing those means you are not only withdrawing your support, but doing that which is still more injurious. In the present case the former obligation may be looked to to assist the construction of the latter. If they were not to take preferential security for goods that they were presently sending out to him, it would seem that, *a fortiori*, they could not take such security for a past debt without breaking the obligation that they would not withdraw their support.

Having dealt with the construction of the agreement, so far as it is necessary to construe it for the purposes of this action, it remains to consider whether in point of fact the breach of the obligation not to withdraw support has been proved. Before commenting on the evidence, it is right to observe that the parties elected to have their case heard by the judges instead of by a jury. Their Lordships' function sitting on appeal will be to ascertain whether there is evidence upon which the Court might fairly act in coming to the conclusion they did in favour of the Plaintiff.

The material evidence is to be derived from the letters. The oral proof is short, and is not altogether satisfactory; but there is a correspondence which, although not always very intelligible, sufficiently explains what was the

object of the parties, and what they in fact did in furtherance of that object after the intimation given by Locke's letter in August, which no doubt shows that his position was an infirm one. His letter, dated the 30th August 1870, says:—"My shipments of wool during the last six months have considerably exceeded what I have drawn against them. The Standard Bank here is anything but liberal to me, which makes it very much more difficult to work on than I expected. My stock now is a very nice one, and I could get along very nicely if I had a little more of the needful at my disposal. Really I have run myself so short that my chief time is occupied in planning and scheming, which should be otherwise profitably employed in generally superintending my business and looking up customers." Then he says, "It is terrible hard work, and when your brother arrives, I must see what can be done for the best, as it is impossible for me to continue as I am at present." Then he says:—"My position with the Frontier Commercial and Agricultural Bank is still the great bugbear, and my idea is to wind up my business styled John Locke, and commence a fresh one under some other style in connection with you, or otherwise. I wish also to secure you as far as possible, as I see no other way of accomplishing it." He says in effect:—"The bank is the bugbear; come out, and we will see what is best to be done to secure you, and then I will get out of this business of John Locke and start afresh, and probably in connection with you." Well, that letter is in August.

It appears that Mr. Alfred Adams went out to the Cape in September 1870, and there started a firm with the name of Edenborough and Co., Adams being the only partner who represented

it there; but it is said that Mr. Edenborough was not only a partner in that firm, but in the London House, and that in fact the two firms were identical, but that for some purpose or other the firm in the Cape took the style of Edenborough and Co., and accounts were kept with that firm separately from those kept with the London firm of Adams and Co.

An important letter of the 7th November from Adams and Co. to Locke, in fact written by Alfred Adams, supplies a key to the object of the subsequent transactions. It says, "I am in receipt of your favour, dated November 3, and in reply thereto once for all forbid your entering into any new transaction. You must know of a certainty that I on the part of Messrs. W. J. and A. W. Adams of London have to find you a large amount of capital." Now what for? "To protect and get from you all your outstanding assets, without incurring any further risk in your undertaking any new business." It is "to protect and get from you," not "to get in;" but "to protect and get from you all your outstanding assets." This letter probably was not intended to see the light. It clearly forbids Locke to enter into any new transaction, and says further, we intend to assist you with what capital you want for one purpose only, namely, to get from you all your outstanding assets. Then the same letter says as to wool—"I thought you distinctly understood I would not enter into any speculation or allow you to do so while your estate was winding up. No, and most especially so, in the face of such bad news from Europe. No, do your best to get in your debts and sell your stock. That is all I want you to do." Then he says, "You are now working for me. I cannot send you the groceries you want." Now, what is the

meaning of "you are now working for me?" It is not that he meant to support him as a trader on his own account, for the benefit of his creditors generally, but this:—"You are now my puppet, you are working for me;" and for what object is explained in the former part of that letter.

On the 10th November a letter signed Edenborough and Co. is written to Locke, "W. J. and A. Adams. We would here mention that we have carefully thought over your business engagements to Messrs. W. J. and A. W. Adams, and we refuse on their account to give you credit for anything. We do this for various reasons. We prefer that you continue your business with them as usual as far as they will and do continue to ship to you, and we will on behalf of our friends Messrs. Adams, of London, advance you sundry moneys, you handing us certain bills, bonds, promissory notes, land, shares, life policies, and other property as collateral security for money advanced by us. We shall pay ourselves in full, and will then give up the remainder to your estate." If this means they would simply pay the advances in full, that they would have a right to do; but if it meant other than that, as, looking at what the parties had in view, it appears to have meant, then, for the reasons which have been adverted to, it would be a breach of the arrangement. There is another letter on the 30th December from Edenborough and Co. to Lock:—"Just two lines, you send 1,100*l.* to your credit, but you do not suppose I am going to give you credit for that amount against the advances of F. E. & Co. Your credits given up will not pay the advances yet. I hope you will have cleared all stock out before the year terminates, so that we may be in a fair position to treat with Nicholls."

Now what is the meaning of that? It may be this: our undertaking will then be at an end, the notes owing to the bank will be unpaid, and we shall then be able to make a better arrangement; you will have little left, and they will be obliged to compromise on any terms. This passage also occurs in this letter:—"Outwardly to the world I will take your credits over at a true and fair value, but between ourselves we shall no doubt arrange pretty well to your satisfaction." That evidently points to an alteration of values to be afterwards made in his favour, and certainly gives a hint, which, if Locke was disposed to take it, he might avail himself of in estimating the value of the goods, as it was to appear outwardly to the world.

It is unnecessary to go through all these letters, but there are one or two further passages which bear upon the question of fact whether they really did support him, or whether they were not taking all his assets by way of securing their own debt. There is a letter from Locke to Edenborough and Co. of the 14th December, in which this passage occurs, under the heading "Eastern Province Bank:"—"As I advised you, would sue to day unless guarantee was signed. They have done so and obtained judgment, and at any moment I may be served with a writ. I think this is a mistake on your part, as in the event of insolvency my transactions with you will be considered undue preferences beyond your actual advances to me. As the amounts were due previous to these transactions, however, you must be guided by your own judgment in the matter." This clearly points to an impression on Locke's mind that what they were doing would result in a preference to Adams and Co.

Then there is a letter of the 4th of January from Mr. Alfred Adams to Locke:—"From-

“ tier Commercial and Agricultural Bank, draft
 “ for 1,250l., you must dishonor, and let Nicholls
 “ take what course he thinks prudent. The
 “ 200l. for Hunt I suppose I must pay. I keep
 “ the invoices of the Elaine, but will send them
 “ up to you next week in a somewhat different
 “ form, as if from London.” In these letters
 there are throughout traces of an intention to
 conduct affairs between themselves in a way
 different from that which would appear to the
 world.

On the 12th January there is a letter from
 Adams to Locke :—“ If we manage Nicholls
 “ satisfactorily I should like you and your
 “ books to come down for a fortnight, and
 “ your wife and children, and for you and my
 “ book-keeper to make up a correct account
 “ of W. J. and A. W. A., and Locke—your
 “ shewing; and a ditto of F. Edenborough & Co.
 “ and Locke. I dare say about the middle of
 “ February we shall have an account current
 “ out from W. J. and A. W. A. We would
 “ make yours up to December 31st; in fact,
 “ make up both to the 31st, and also bring out
 “ your balance sheet. I would rather this were
 “ done here, as we shall have to agree values at
 “ which sundry credits are taken, and then also
 “ during that time you and I may possibly decide
 “ about the future.” The accounts which appear
 in this record, and which will presently be
 referred to, were stated by Mr. Miller to have
 been taken from Locke’s books, and no doubt
 they were, but this letter shows that they were
 made up, as some former accounts were, with
 Alfred Adams, and that in point of fact they
 are as much Adams’ accounts as Locke’s.
 That letter also discloses that Locke was
 acting under control at that time as regards
 the books and orders. The parties were
 not acting in the ordinary way in which a

creditor and debtor deal with each other. Mr. Alfred Adams and Mr. Locke were in the same boat, and both rowing the same way; and it is plain that Nicholls, representing the Bank, was kept in entire ignorance of this secret winding up.

On referring to the accounts, it appears that there were securities handed over to Edenborough and Co., or, in other words, to Mr. Alfred Adams, to the amount of about 12,000*l.* odd, in excess of the present advances they had made. These accounts have been gone into at considerable length, and it is unnecessary for their Lordships to go through the figures, but they have followed with great care the able analysis which Mr. Miller made of those accounts, and his remarks upon them, and what has been said on the other side; and in the result they have come to the conclusion that the securities and assets of Lock were handed over as far as he could hand them over to Mr. Alfred Adams, to be dealt with as he thought best for the interest of Adams and Co., and that, in point of fact, there were assets handed over beyond the present advances at least to an amount represented by that balance of upwards of 12,000*l.* It is impossible to ascertain very accurately in what way that balance was ultimately dealt with, but there can be no doubt that Adams and Co. got the benefit of it upon their general account.

Their Lordships therefore think that these dealings afford evidence that Messrs. Adams and Company were not fulfilling their engagements to support Locke, that in truth they withdrew their support in the true sense of the term, and took securities and assets from him which, to the extent to which they took them, disabled him from carrying on his trade. That being so, they think the judgment or verdict

is right, and that the Plaintiffs are entitled to succeed in this action.

The only remaining question is that of the damages. There is no special damage laid in the declaration, and the Plaintiff must be content to claim general damages. It is no doubt difficult to estimate with precision the proper amount to be assessed for a breach of this agreement. The Court, by refusing the offer made by Messrs. Adams and Co. to pay 2,000*l.*, must have considered that damages to a larger amount ought to be recovered. Their Lordships think it is unfortunate for all parties that this offer of compromise was rejected, for when the action was brought the Plaintiffs limited the damages they claimed to that amount. There are two specific matters in respect of which the Plaintiffs may have been damaged. The second of the notes given by Locke, a note of 1,250*l.*, fell due within the year. Supposing Locke had been kept afloat, there is great probability that he would have paid that note. That is therefore an amount which, supposing his trade had been going on, the bank might have received. There is further a sum of 200*l.* or 300*l.* in respect of calls on shares which Locke might have paid. Those sums together amount to 1,500*l.* or 1,600*l.* Further loss may have been sustained by the Bank in consequence of the premature withdrawal of the support which had been promised to Locke. It is difficult to estimate that damage, but their Lordships cannot say the Court were wrong in giving the amount claimed in the action. If Locke had been supported, it is possible that he might have gone on after the end of the year, and might have paid the other two bills either wholly or in part. The chance was not a very high one, otherwise the damages ought to have been more, but still it was a chance to be estimated; and their Lordships

cannot say on the whole that they would be justified in interfering with the discretion of the Court below by reducing the amount of damages.

In the result, their Lordships are of opinion that they must humbly advise Her Majesty to affirm the decision of the Court below, and to dismiss this Appeal, with costs.

