

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Archibald Hood, Trustee in the Liquidation of the Estate of Salvatore Decandia v. Stallybrass, Balmer, and Company, and Aurelio Kanuna and Victor Kanuna (trading under the style of "Kanuna Frères"), from Her Britannic Majesty's Supreme Consular Court, Constantinople; delivered 27th June 1878.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

THIS is an appeal by Archibald Hood, the trustee in the liquidation of the estate of Salvatore Decandia. It is against an order of the learned Judge of the Supreme Consular Court of Constantinople, dated the 7th of November 1876, whereby he refused to set aside two former orders of the same Court, dated respectively the 31st July 1876, and the 20th October 1876, and confirmed those orders. The two latter orders were made in different suits, and although the applications for their discharge were by arrangement heard and disposed of together upon the same evidence, it will be convenient, their Lordships think, to consider the two cases, which are in some respects distinct, separately. The following facts which are common to both cases should first be stated.

Salvatore Decandia carried on business at Cardiff in this country, his principal if not only business being the consignment of coals to Constantinople to be sold there. The sales were effected by his brother Vincenzo Decandia, the

character in which he made them being one of the matters more or less in dispute. On the 19th July 1876 Salvatore Decandia became insolvent and went into liquidation; on the 21st July 1876 that fact became known by telegraph to Vincenzo Decandia in Constantinople, who on the same day made and signed a declaration whereby he certified that all coals in his possession, and debts due to him for value of coals sold on credit, belonged to S. Decandia, of Cardiff; on the 27th of July, six days afterwards, Vincenzo received from the Appellant Hood, and one Griffiths, then acting as receivers under the liquidation, an order by telegram to stop all sales and deliveries except to one person, Haidar Pasha, who is said to have represented the Government at Constantinople, and he telegraphed back on that day to Messrs. Hood and Griffiths that their instructions would be carried out. In his affidavit of the 2nd of August 1876, which states these facts, he further says, "And accordingly I ordered the said coal store to be shut up and took the keys in my possession and left outside a trustworthy 'Bekey,' and since the 27th July last past, no coals whatever came out from the store." Now if Vincenzo Decandia was, as the Appellant represents, and himself has sworn, a mere commission agent of his brother Salvatore Decandia, it is clear that upon the 27th July that agency was determined; that, as Mr. Benjamin put it, he then attorned to the receivers under the liquidation; and that from that time, whatever he did in respect of the coals in his possession, he must be taken to have done as agent for them or for the Appellant who afterwards became sole trustee.

Their Lordships will now deal with the case of Stallybrass, Balmer, and Co. On the 31st July that firm brought an action in the Consular

Court of Constantinople against Vincenzo Decandia, as acceptor of a bill of exchange drawn by Salvatore Decandia at Cardiff on the 13th of March 1876 for 500*l.*, which was in these words: "Four months after date pay to my order the sum of five hundred pounds sterling, value received in coals, and advance p. Eskdale S.S.," and was addressed to "Vincenzo Decandia, merchant, Constantinople." The acceptance is not stated on the face of the copy of this bill which is set out in the summons, but it is admitted to have been, like that of the bill which will be afterwards referred to, an acceptance made payable at the office of certain agents in London. The bill bore the blank indorsements of Salvatore Decandia and of Stallybrass, Balmer, and Co., who had probably discounted it. The affidavit of the Plaintiff's agent, which was filed with the summons, stated that the Defendant had admitted his inability to pay; that he had in his store a quantity of coal amounting to at least 1,800 tons, and that in order to secure the payment of the bill it was necessary to restrain him from parting with so much of the coal as would cover the amount of the bill with interest and costs, being the sum of 520*l.* Accordingly upon the same day, the 31st July, the Court made an order that, until the further order of the Court, the Defendant should be restrained "from parting with, selling, or dealing in any way whatsoever with 450 tons of coal now lying in the store of the said Defendant at Courouchesme." That is the first of the orders which it was afterwards sought to discharge. An application seems to have been made in the first instance by Vincenzo Decandia to get it set aside, and for that purpose he on the 2nd of August made the affidavit, the material parts of which have already been read. This was corroborated by the affidavit of one John

Vaffiades, his clerk, which was also directed to show that the coals in the coal depôt were the property of Salvatore Decandia. A rule to show cause why the order of the Court of the 31st July 1876 should not be set aside was thereupon granted, but no further proceedings took place upon it, and on the 15th December 1876 judgment was, with the consent of the Defendant, entered for the Plaintiffs for the sum of 500*l.* sterling, with interest at the rate of six per cent. per annum, together with taxed costs of the suit. So far the proceedings were all between the holders of the bill and Vincenzo Decandia the acceptor. But on the 25th September 1876 an application was made on the part of Mr. Hood, the Appellant, to set aside the order of the 31st July 1876. It was supported by documents showing what had taken place under the liquidation, and also by his own declaration that Salvatore Decandia was the owner and proprietor of the coals, and that he, as trustee in the liquidation, was the person entitled to receive that coal or to sell and dispose of it. This was one of the applications finally dismissed on the 7th of November 1876 by the order under appeal.

The sole question between the Appellant and Stallybrass, Balmer, and Co., as it seems to their Lordships, is, in whom was the property in the coal? If in the Appellants, the proceeds of that coal ought not to be applied in satisfaction of the judgment recovered against the acceptor, to the prejudice of the creditors and estate of the drawer of the bill. The direct evidence as to the ownership of the coal appears to their Lordships to be all one way. Vincenzo Decandia made further affidavits in addition to those already mentioned. He was also examined in the other suit, *vivâ voce*, and his examination has by arrangement been allowed to be used as evidence upon the hearing of the application

for the discharge of the order. The whole of that evidence, corroborated by the letters that are referred to in the affidavit of the 21st October 1876, go to establish the case that he was a mere agent selling on commission, though the terms of that commission were not very clearly defined; that he had no proprietary interest in the coal, which belonged in fact to Salvatore Decandia alone, and that before the action was brought he had agreed to hold the coal remaining in his hands on account of the trustees or receivers in liquidation.

It has, however, been argued at the bar that the Judge might not unreasonably disbelieve all this evidence, and from the fact that the coal was found in the possession of Vincenzo in a store ostensibly belonging to him, and from the statement on the face of the bill to the effect that value had been received in coals and advance p. Eskdale S.S., come to the conclusion that Vincenzo had such a legal interest in the coal as would make it properly applicable to the satisfaction of his judgment debt.

It appears, however, to their Lordships that no such inference can properly be drawn from the form of the bill; and that the mere fact of the possession of the coal is consistent with either theory as to its ownership. The bill may have been drawn as it was in order to give to Vincenzo's acceptance more credit than it deserved. But this circumstance cannot affect the question of property between the trustee in liquidation and the estate of the drawer, and the creditors of the acceptor. There was no hypothecation of the coal to meet the bill. Again, if the direct evidence given as to the character in which Vincenzo acted were untrue, it is difficult to see why it was not met by counter evidence. There must have been in such a case at Constantinople some means of showing that he was in fact

an independent merchant, and that he held the coal in a character other than that in which he was alleged to hold it. It therefore seems to their Lordships that the effect of the order of the 31st July 1876 was in fact to apply to the payment of Vincenzo's debt, the property which ought to have gone to the trustee as property of Salvatore Decandia, to be applied in the due course of administration of his insolvent estate, and consequently that that order cannot be supported.

The other case was of this nature: A similar bill had been drawn on the 5th of May by Salvatore Decandia at Cardiff, "Four months after date pay to my order four hundred eighty-two pounds sterling, value received in coals per Fanny Mimbelli." It was addressed to V. Decandia, merchant, Constantinople. It was accepted by him, payable at Messrs. H. Clarkson and Co., 20, Billiter Street, London, was endorsed by Salvatore Decandia, and subsequently endorsed by Messrs. Palmer, Hall, and Co., who are presumed to have discounted and to be the real holders of it. However that may be, they sent this bill to the Respondents, Messrs. Kanuna Brothers, for realisation at Constantinople from Vincenzo Decandia. Their suit was not commenced until the 18th September 1876. Vincenzo Decandia, when he was applying for leave to defend the suit, put in an affidavit which, amongst other things, contained this statement: " I have been informed by Aurelio Kanuna, one of the said Plaintiffs, that the firm Kanuna Frères has no interest whatever in the payment of the said bill, that all the interest therein belongs entirely to the firm Palmer, Hall, and Co. (signed in the second endorsement), for whom Messrs. Kanuna Frères are acting in this matter, as they generally act in all other matters under a power of attorney. That the

“ said Salvatore Decandia of Cardiff, drawer of
 “ the said bill, instituted proceedings for liqui-
 “ dation under the Bankruptcy Act, 1869; and
 “ on or about the 22nd day of August 1876 a
 “ resolution was carried out by which his credi-
 “ tors accepted a composition of five shillings
 “ per £ in full settlement of their claims. That
 “ amongst the other creditors there appeared
 “ and accepted the composition of shillings 5
 “ per £ Palmer, Hall, & Co. creditors, for
 “ the same and identical bill of exchange on
 “ which the said summons herein served upon
 “ me was taken out,” and he objected to pay
 the sum endorsed. The Court gave him leave
 to defend the summons upon the terms of
 paying three fourths of the amount into Court.
 He was unable to comply with those terms, and
 the result was that judgment by default was
 entered up against him, and there is no appeal
 against that judgment.

The next proceeding against him was the
 issue of a judgment summons, which called
 upon him to state what means he had of
 paying. On examination he said, “ I have no
 “ means to pay. I accepted this bill. I did
 “ not accept them against coals. I accepted
 “ them because I thought my brother was rich
 “ and a shipowner and could pay. I was foolish
 “ enough to sign this bill and others. I accepted
 “ them as accommodation for my brother. At
 “ my father’s request by letter, I can find I can
 “ show letters by which my brother said he would
 “ pay, as really he had paid, other bills in London.
 “ I have often accepted similar bills. I never
 “ bought bills of my brother. My brother sent
 “ me coals, a large quantity. I was the agent
 “ of my brother at the date when this bill was
 “ drawn. I had coals in my possession sent by
 “ my brother. Had three thousand tons, worth
 “ 5,000*l*. It was not intended that the bill should

“ be paid by proceeds of coal. The coals I had
 “ at that time sold by me and remitted, of 1,500
 “ tons, 2,500*l.* about. Since the 18th September
 “ coals have been sold, all except 480 tons.”
 Then he refers to the sequestration of the 31st July.

In his affidavit in the other suit, sworn on the
 2nd of August 1876, he had said: “The quan-
 “ tity of coals existing in the said depôt is of
 “ about 1741 (tons), and all the said quantity
 “ belongs in full and exclusive property to the
 “ firm S. Decandia of Cardiff.” And he added:
 “ Since the 27th of July last past, no coals
 “ whatever came out from the store.” If then
 at the date of this examination he had sold all
 except 480 tons, he must have sold a very con-
 siderable quantity of coals—1,261 tons, under
 orders from the trustee, or, at all events, after
 he had attorned to the trustee and had changed
 the character of his agency. The result of his
 examination was that the Court made an order,
 being the second of those complained of, in these
 terms: “That all sums owing by all companies,
 “ firms, or individuals, to the said Defendant, or
 “ to him as agent for S. Decandia, of Cardiff,
 “ or his estate, for or in respect of coals, be
 “ paid by the said Defendant into this Court to
 “ answer in the first place the judgment of the
 “ Plaintiffs herein-under and subject to the
 “ further order of this Court.”

In so far as this order as to the proceeds of
 coals sold is sought to be maintained on the
 ground that the coals were the property of
 Vincenzo, that question has been disposed of by
 what their Lordships have said in the former case.

It has, however, been argued that this order,
 so far as it relates to sums due to Vincenzo, “ as
 “ agent for S. Decandia, of Cardiff, or his estate,
 “ for or in respect of coals, was proper in the
 “ circumstances, and capable of being supported.”

Their Lordships admit that there is considerable

force in the arguments which have been addressed to them by Mr. Wilson on this point. His contention, as their Lordships understand it, was to the effect that if Vincenzo were a mere agent on commission, he was entitled to be indemnified out of the proceeds of the coal sold by him against all liabilities incurred by him on account of his principal; that his acceptance being, as the Appellant alleges, a mere accommodation acceptance, was a liability of that character, and that his creditors had the right of standing in his shoes in that respect. In support of this contention the cases of *Armstrong v. Stokes*, L. R. 7 Q B., *Elberger Gesellschaft v. Clay*, and *Hulton v. Bullock*, L. R. 8 Q B., and *Drinkwater v. Goodwin*, 1 Cowp. 250, were cited. It appears however, to their Lordships, that the order in any case is considerably too wide, because it covers the proceeds of coals which were sold after the 27th of July 1876, when Vincenzo, in selling any coals, was acting as the agent, not of Salvatore Decandia, but of the trustee for his creditors; and that in no point of view could it be proper to apply the proceeds of such coals in satisfaction of the judgment recovered by Kanuna Brothers. The order, it may be further observed, is one which does not attach the proceeds in the hands of the vendees, it applies only to the proceeds of the coals after they had been received by the Defendant himself, when his rights against his principal would depend on the result of the account to be taken between them.

Looking to the wide form of the Order, their Lordships are of opinion that when the application was made to the Judge of the Consular Court to discharge it he ought to have done so, or at all events to have varied it, and therefore that on this appeal and on this record the Appellant is entitled to succeed in respect of that Order also.

In so ruling, their Lordships do not wish to prejudice any question which might fairly have arisen in respect of any right which upon the authority of the cases cited by Mr. Wilson, Messrs. Palmer, Hall, and Co., or Messrs. Kanuna Brothers, might have had upon a state of facts properly established to stand in the place of the agent in respect of the proceeds of coals sold before the 27th July 1876. They do not, however, feel in a position to make any declaration or to come to any decision on that question, because it does not appear ever to have been fairly raised or considered in the Court below. Moreover it is a point worthy of consideration, whether such a right, if it ever existed, may not have been lost by what has taken place under the insolvency of Salvatore and the alleged acceptance by Palmer, Hall, and Co., of the composition from the trustee in liquidation. The acceptance of such a composition, if properly pleaded and proved, might have been a good defence to the action against Vincenzo, by extinguishing his liability as an accommodation acceptor.

Their Lordships, therefore, dealing with this case as it stands upon the record, which is unfortunately very scanty, must humbly advise Her Majesty to allow the appeal, to reverse the order of the 7th of November 1876, and in lieu thereof to order that the orders of the 31st of July and 20th of October be set aside, and that the Appellant do have his costs of the applications to discharge those orders from the Respondents. If any costs have been paid by the Appellant to the Respondents or either of them, under the orders of the Consular Courts, which are now to be reversed and discharged, they must be paid back to him. He will also be entitled to his costs of this appeal, which the Respondents will be liable to pay in equal moieties. The money deposited by him to abide the event of the appeal will be returned,