

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abraham Cohen v. Alfred Sandeman, from the Supreme Court of New South Wales; delivered March 12th, 1879.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE facts of this case are not in dispute and may be shortly stated. Allen, a builder, agreed with Cohen, the Defendant, to build for him a hotel for the price of 4,470*l.*, to be paid by instalments at the rate of 75*l.* per cent. on the work actually performed, on the certificate of the supervisor of works, and the balance on a certificate that the whole of the works had been completed. Contemporaneously with this contract a bond was entered into whereby two persons, one of the name of Watson, bound themselves in the sum of 250*l.* to Cohen, the condition of the bond being the due and faithful performance of the contract by Allen. The agreement for building, which was by deed, contains this provision, having reference to the bond, "If the contractors shall become bankrupt
" or compound with or make any assignment for
" the benefit of their creditors, or shall suspend
" or delay the performance of their part of the
" contract"—except for certain causes, "the employer, by the architects, may give to the
" contractors, or their sureties, or assignee, or
" trustee, as the case may be, notice requiring
" the works to be proceeded with; and in case of

“ default on the part of the contractors, or their
“ sureties or assignee, or trustee, for the period of
“ 30 days,” then the employer may complete
them himself. It appears that Allen did a con-
siderable portion of the work, and obtained
certain payments at the rate of 75% per cent. on
the certificate of the supervisor. Upon his
becoming bankrupt, the event contemplated by
this clause, the Defendant gave notice, in pur-
suance of the clause, to Watson, one of the
sureties, to proceed with the works. Watson did
proceed with and did complete the works. The
assignee of the bankrupt thereupon treating the
completion of the works by Watson as a com-
pletion under the contract, sued the Defendant
for what remained due. The Supreme Court of
New South Wales held by a majority that he
was entitled so to sue. This is the judgment
under appeal.

The form in which the question is raised on the
pleadings is this: The declaration is upon the
agreement alleging a completion of the work
to the full satisfaction of the supervisor ap-
pointed by the Defendant, and claiming the
remaining moneys due. The pleas aver the
abandonment of the work by Allen, and its
completion by Watson under notice, the first
plea stating the abandonment to have been
before his bankruptcy, the second after. In his
replication the Plaintiff sets out the bond and
the clause of the building agreement above
set forth, and proceeds to aver: “After the
“ making of the said bond, and in pursuance
“ of the said condition in that behalf, the
“ Defendant gave the said William John
“ Watson, as such surety as aforesaid, notice
“ requiring him to proceed with the said
“ works, and the said William John Watson
“ thereupon proceeded with and duly completed
“ the said works in accordance with the said

“ contract, specifications, and conditions, and
“ under the provision of the said deed in the
“ said pleas respectively mentioned, and not
“ otherwise; and the Plaintiff further says
“ that upon such due completion as aforesaid
“ the right of action under the said deed vested
“ in the Plaintiff as official assignee of the
“ insolvent estate and effects of the said Charles
“ Frederick Reid Allen, and that he is suing in
“ this action in order to recover from the
“ Defendant partly, for his own benefit as such
“ official assignee as aforesaid, and partly for the
“ benefit of the said William John Watson, the
“ balance of the moneys due by the Defendant
“ under the said deed upon the due completion
“ of the said work.”

Their Lordships are of opinion that the effect of the clause in the agreement which has been read with respect to notice being given to the surety, is to provide for a substituted performance of the contract, which took place, and of which the Plaintiff, as official assignee, is entitled to avail himself. There was no right on the part of Watson to sue the Defendant; no new contract was entered into between them; the Defendant, in pursuance of the agreement with Allen, and treating it as in operation, gave a notice to Watson, which Watson complied with in order to escape the penalty to which he would otherwise have been liable; this is the only agreement on which the Defendant can be sued, and Allen only or his assignee can sue upon it.

The judgment affirming the Plaintiff's right to sue is therefore correct. It has indeed been suggested that the Plaintiff, as official assignee, could not have any right to sue for the benefit of Watson. If it were necessary this allegation in the replication might be struck out, which would still show a good answer to the pleas. Watson will certainly have a claim against the

estate in respect of the work that he has done, and therefore what is recovered will in one sense inure to his benefit.

For these reasons their Lordships will humbly advise Her Majesty that this judgment be affirmed and the Appeal dismissed with costs.