Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pallikelagatha Marcar and another v. *John Gothfried Sigg and another, from the High Court of Judicature at Madras, delivered* 21*st February* 1880.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Respondents (the Plaintiffs in the suit out of which this appeal has arisen) are merchants, carrying on business at Winterthur, in Switzerland, under the style of Volkart Brothers. Their house had subordinate branches or agencies in India for the purposes of their trade with that country. Of these, the head or principal one was at Bombay, and under the management of a Mr. Kapp; the other was at Cochin, where the transactions in question took place, and was managed, up to some time in February 1874, by a Mr. Spitteler, and after that date by a Mr. Jung, who had previously been his assistant.

The Appellants, the Defendants in the suit, are native merchants at Cochin, trading under the style of P. Marcar, the second Defendant being the active partner of the firm.

The history of the transactions between the Plaintiffs, through their agents at Cochin, and the Defendants may be conveniently divided into

three periods, the first ending with the annual settlement of accounts up to the 30th of June 1872; the second beginning from that time and ending with the execution of the agreement L, on the 2nd of January 1874; and the third, which comprehends the transactions under that agreement, ending with the institution of the suit on the 10th of December 1875.

The first is material only in so far as it shows what was the course of dealing between the parties whilst there was no substantial (if any) dispute between them. Their transactions were of two kinds. The first and more importan class consisted of purchases, chiefly of native-grown coffee, oil, and pepper, made by the Defendants from the producers and delivered to the Plaintiffs' agent at Cochin, for shipment to their firm in Europe. These were almost invariably made upon contracts for future delivery at a stipulated price, of which the following, made on the 23rd September 1872 (Record, p. 178), may be taken as an example. The material parts of it are as follow :—

"Contract with P. Marcar, of Cochin, for 1,000 cwts Malabar native coffee, at Rs. 30½ per cwt., delivery on or before the end of January 1875.—I, the undersigned P. Marcar, of Cochin, agree and bind myself to deliver to Messrs. Volkart, of Cochin, on or before the end of January next, one thousand cwts. Malabar native coffee," to be packed, garbled, and delivered as therein mentioned, "at the price of thirty and a half rupees per cwt. net. . . . . On account of which agreement, I have this day received from Volkart and Brothers the sum of Rs. 50, the balance to be paid as agreed. In case of non-fulfilment of this agreement, I bind myself to pay to Messrs. Volkart Brothers, as penalty, Rs. 3 for each cwt. short delivered."

It is to be observed that the Rs. 50 mentioned in this form of contract was rather in the nature of earnest money to bind the contract than the measure of the advance made to enable the Defendants to perform it. Such advances were almost invariably made, but they seem to have

been made on general account, the particular amount of advance attributable to each particular contract being, apparently, settled orally under the provision expressed in the words "to be paid as agreed," and deducted from the price when that was adjusted on the delivery of the produce. That this was so appears by the receipts for advances, the adjustment of particular contracts, and the copies of "purchase accounts" set out in the record.

The other class of transactions consisted of consignments to Europe by the Defendants on their own account, made through the firm of Volkart Brotners. There were thus cross accounts between the Plaintiffs and Defendants, viz., the purchase account and the consignment account, which were kept separately under these titles, and besides these there appears to have been an "interest account," the nature of which it is difficult precisely to define, but which was certainly different from the "interest account" to be spoken of hereafter. These three accounts would naturally result in a general account current between the two firms, which Mr. Jung swears was regularly kept. The date as on which these accounts were balanced, and ought to have been settled, was the 30th of June in each year. But such settlement, at all events of the general account current, does not appear to have been very regularly made, since the account K (p. 71), which purports to show the balance of the general account current on the 30th of June 1873, comprehends items which ought to have been included in the account for the preceding year, and was not finally adjusted until March 1874. It may, however, be collected from the purchase account A (p. 117), the consignment account B (p. 122), and the interest account D (p. 124), that the general balance due from the Defendants to the Plaintiffs on the 30th of June 1872 was about Rs. 1,68,867. 8. 10.

The price of native coffee rose in the latter part of 1872 and 1873. On the 24th of January 1873, Mr. Spitteler, who then managed the Cochin agency, obtained from the Defendants security in the shape of the letter I, p. 134, and the deposit of the title deeds therein mentioned. The true construction of this letter, which is one of the principal questions in the cause, will be afterwards considered. In February 1873, the price of coffee having risen to Rs. 40 per cwt., it became manifest that the Defendants could not fulfil their contracts with Defendants for deliveries in 1873 without heavy loss. In these circumstances, Mr. Spitteler made to them further and extraordinary advances, amounting to Rs. 5,00,000 in the whole, by payments which, in the Defendants' case, are stated to have been made on the 12th, 13th, and 19th of February, and the 8th of March 1873. It became a matter of controversy in this suit what were the object, nature, and effect of this transaction. The Defendants have set up that they threatened to abandon their contracts on the terms of repaying the particular advances attributable to them, and of paying the stipulated penalty of Rs. 3 per cwt.; that they were persuaded by Mr. Spitteler to forego this intention, and to accept the advances, on the understanding that the money was to be employed in buying coffee at the markct price on account of Volkart Brothers, on whom the losses incurred in this operation were to fall. Mr. Spitteler, on the other hand, has deposed that, when the advances were made, the coffee deliverable on the contracts for 1873 had been all, or nearly all, actually or constructively delivered (an assertion hardly borne out by the terms of the contracts or other evidence in the cause), and that the advances were made in order to enable the Defendants to pay for the coffee, and thus to obtain the command of the market for the following season.

The best evidence of what was understood by the parties to be the nature of the transaction between them is that afforded by their written statements made at the time. These have been admitted, without objection, on the record. Mr. Spitteler, advising his principals in Europe of these advances, when they amounted to only Rs. 3,00,000, wrote, on the 19th of February 1873 (p. 168), as follows:—

"Coffee. On the coast Rs. 40 to Rs. 40½ are readily paid, but most of the dealers find it already now impossible to get produce, and it is already pretty distinctly and openly said that E. Baudry & Co. have received notice from their contractor, Baboo, according to which a great part of their contracts will remain unfulfilled. The reason we can explain easily. Marcar has not only 5,000 cwts. over his contracts already had delivered to him, but his friend Ramon has still about 20,000 cwts. in his possession, which are in the first place reserved to Marcar. As he actually requires money for these payments, we have agreed with him that he should not sell for one month, without our sanction, either to natives or exporters, but should keep in his possession the whole quantity for the chance of orders. There against we advanced him three lacs, and he has to make good to us all interest, back commissions, &c., in case we should not find any employment for the remaining coffee, otherwise we shall bear these charges ourselves, but shall pay Marcar a corresponding lower rate than market rate. Through this arrangement we have enabled Marcar partly to recoup himself for the sustained loss, whereas we, on the other side, reserve ourselves a good chance to do some further considerable business this season. We have no doubt, under the exceptional circumstances, you will approve of our having done so, especially as we hold in our possession security for the greater part of the amount."

In the letter of the 19th July 1873 (p. 140), which the second Defendant wrote to Mr. Solomon Volkart in the course of the subsequent negotiations, he says,—

"Last year I entered into several coffee contracts for coffee delivery, amounting to 40,000 cwts., at different rates, averaging Rs. 31. 14. 9 per cwt. f. o. b., and have suffered considerable loss in them. I little expected that the price of coffee would have risen so high in a few days, and that, too, at a figure which no merchants experienced at any time. My friends, as usual with them, held a large portion of coffee. I was, however, unable to arrange a fixed price, owing to their exorbitant demands, and, although aware of the failures of the Brazil and Java crop, I little anticipated that price would grow

beyond 30 to 31, being the highest limit native coffee was ever raised to; and I forbode the certainty of recession. With these impressions, I entered into the contracts with your firm. The first few parcels which arrived in the market were met with ready buyers at Rs. 30½ per cwt., for ungarbled, besides a payment of Rs. 3 per cwt. for expenses of conveyance, there being a marked increase of price daily, particulars of which were duly communicated to your Mr. Spitteler. I saw the necessity of paying for the coffee at market price to my parties in order to fulfil my contracts with you, as well as securing the remaining coffee in their hands, who would otherwise have resorted to others, thus entailing on me serious difficulties to bring them round again for future operations, with the view of covering the loss which threatened me on all sides. With these circumstances, I was compelled to receive the advances from Mr. Spitteler, who foresaw that if I were to pay penalty for short delivery, as stipulated in the agreement, there would have appeared to my favour Rs. 4,00,000, as compared with market price, against Rs. 1,21,000, being penalty at Rs. 3 per cwt., with certain and sure loss to the firm. I, however, considered my credit in your office, the position you hold in the commercial circles, and the difficulties in which you would have been involved, and taking courage in the confidence you repose in me, did all that I possibly could towards the fulfilment of my agreement, trusting entirely, as I now do firmly trust, that, with a little assistance and time from you, I should be able to make up the loss."

It is unnecessary to quote more of this letter. Its whole tone is that of a debtor admitting his liability for the advances in question, but pleading with his creditor for indulgence in consideration of the circumstances in which, and the motives for which, that liability was incurred. The account which it gives of the substance of the transactions is not inconsistent with that of Mr. Spitteler, though differing from it in some details, and particularly in the suggestion that, but for the consideration due to the Plaintiffs, and for the prospect of future business, the Defendants might have escaped from their contracts of 1872–73 with less loss, by paying the stipulated penalty of Rs. 3 per cwt. Looking to that letter and to the other evidence in the cause, their Lordships have no difficulty in coming to the conclusion that not only was the sum of

five lacs so advanced to the Defendants as much a debt due from them to the Plaintiffs as any of the ordinary advances made on the purchase account (a fact found by both the Indian Courts and now hardly disputed), but that the Defendants fully recognized and admitted that liability in 1873. The first suggestion of their contention to the contrary would seem to have been made in their letter of the 26th November 1875 (p. 160), when the differences between them and the Plaintiffs, which resulted in the institution of this suit, were at their height.

The Plaintiffs, on being advised of these exceptional advances by Mr. Spitteler's letter of the 19th February 1873, lost no time in telegraphing their surprise and dissatisfaction, and seem to have contemplated immediate proceedings for the recovery of the amount from the Defendants. Thereupon ensued a long correspondence, and a negotiation, of which it is sufficient to state that it extended over many months, that it was conducted in India, on the part of the Plaintiffs, not only by Mr. Spitteler, but by Mr. Kapp, the manager of the Bombay agency, and Mr. Sigg, a partner in the European house, who was sent out for that purpose, and that it ended in the execution of the agreement L, on the 2nd of January 1874. In the course of this negotiation, and on the 25th of October 1873, the Defendant gave to the Plaintiffs the further security contained in the letter J and the schedule thereto, and various arrangements, of which it is unnecessary to say more at present, were proposed and rejected. Of the final arrangement, embodied in the document L (the construction of which will have to be hereafter more particularly considered), it is now only necessary to state that it proceeded on this basis. The balance due to the Plaintiffs by the Defendants was stated to have been, as on the 1st July

1873, Rs. 6,78,012. 10. 1, but was afterwards found to have been only Rs. 6,13,007. 6. 5, as shown by the account K. Of this balance, Rs. 300,000 were to be carried to what was styled "the block account," and the remainder to what was styled "the interest account," by which was meant an account bearing interest. "The block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, such returns to be calculated according to a stipulated scale. This arrangement was to be partly retrospective, in that a sum of Rs. 53,056. 13 was to be carried to the credit of the "block account" as for returns on transactions between the 1st of July 1873 and the 1st of January 1874, and various sums, amounting to Rs. 1,45,357, were to be credited to the Defendants on the "interest account," as due to them in respect of transactions during the same period. And, lastly, the agreement contained an express stipulation that the balance of interest to accrue due on "the interest account," which was to carry interest on both sides of the account, should be paid in cash on the 30th of June in each year.

The subsequent transactions between the European and the Native firms, all proceeded on the basis of the arrangement embodied in L. It is unnecessary to examine these in detail. It is sufficient to state that during this last period of the dealings between the Plaintiffs and Defendants their relations seem to have been somewhat strained, but did not become actually hostile before the month of August 1875. On the 10th of that month the Cochin agency wrote a letter to the Defendants, enclosing an account headed "interest account," and demanding payment of a sum of Rs. 35,119. 14. 9, as presently payable under the terms of Letter L., for interest due on "the interest account" up the 30th June 1875,

and for short proceeds. The Defendants paid on account Rs. 10,000 in September, and the further sum of Rs. 583. 3 on the 3rd of November, the latter sum being all which on their mode of stating the account they admitted to be their due. Their letter, remitting this last sum, is at p. 151, and the account enclosed in it at p. 13 of the Record. On the 10th November 1875 the Plaintiffs, after giving credit for these sums, and for another small payment of Rs. 146. 3. 10., and admitting some errors in their previous account, reduced the balance, of which they again demanded present payment, to Rs. 15,768. 3. 7.

On the same day they wrote another letter to the Defendants, apparently in answer to some offer of produce, in which they said:—

"We beg to say that, as already verbally told your Mr. Marcar, we cannot entertain the idea of entering into fresh engagements with you, until such time as the balance of interest and short proceeds has been settled satisfactorily, and in accordance with the agreement of 2nd January 1874. We hereby request you peremptorily to hand over such amount, viz., Rs. 16,014. 6. 7, with the interest due up to date to bearer."

The difference between this sum and that demanded in the letter of the same date is the sum of Rs. 146. 3. 0, of which the latter admits the receipt by a cheque.

The sum to which the amount in dispute was thus reduced was made up of the sum of Rs. 12,789. 1. 11, which, being the difference between interest at 6 per cent. and interest at 9 per cent. upon the balance of "the interest account," the Defendants claimed to be allowed under the provisions of L; and of that of Rs. 2,979. 1. 8, as to which, though they admitted it to be due for short proceeds, they insisted that it was not then payable, but ought to be carried to their debit in "the interest account." Further correspondence, of a more or less angry character, passed between the parties, till on the

8th of December 1875 the Plaintiffs wrote to the Defendants (p. 45) as follows :—

"In reply to your letter of the 7th instant, we beg to state that you are well aware that we consider that you have entirely broken your engagements with us for the liquidation of your block account, both in regard to the offers you have made and in carrying out your contracts, and also in regard to the returns, the benefit of which you ought to have given us. In reference to the interest account, you have refused to pay us the interest due us on the 30th June last, and you have entirely neglected to make any attempt to pay us the large balance due us on this account. Under these circumstances, we are compelled to put the case into Court, and any further discussions will be useless. We must, therefore, decline to take notice, at present, of the tissue of erroneous statements you have put forward in your last letters."

In reply to this, the second Defendant wrote on the same day a letter of remonstrance (p. 166), denying the imputed breaches of Plaintiffs' agreement, expressing his willingness to go on under it, showing that the dispute as to the interest might be settled "by means otherwise than legal," and concluding as follows :—

"Under these circumstances, take notice that, I hold you responsible to me for all damages arising from your withdrawal from a contract which up to yesterday I showed a ready disposition to carry out myself; that from this date I repudiate your further right to fall back upon that agreement; and that I shall bring such action against you for the recovery of compensation for loss sustained by your breach of contract as I may be advised to take."

The plaint was filed on the 10th of December 1875. It sought to recover the sum of Rs. 1,80,897. 5. 2, the admitted balance on the block account without interest; and the sum of Rs. 2,24,882. 8. 7 as the balance due "on the interest account" with interest on such balance "from the 7th December 1875. The balance thus claimed on "the interest account" included the Rs. 15,768. 3. 7, of which immediate payment had been demanded in November. The plaint also prayed for a declaration that the instruments of mortgage I and J created and were mortgages of the interest of the Defendants

in the properties mentioned in the schedule, and that, if necessary, an account might be taken of what was due by the Defendants to the Plaintiffs on the said mortgages.

The issues finally settled in the suit were,—

(1.) Whether the mortgage instruments of 21st and 25th October 1873, I and J, are valid and subsisting mortgages for the balances that may be found due by Defendants to the Plaintiffs, or for any part thereof.

(2.) Whether, on the 30th of June 1873, there was a balance of Rs. 6,13,097. 6. 5 due by Defendants to Plaintiffs.

(3.) Whether the Defendants have committed any breach of the agreement of the 2nd January 1874, and, if not, whether the Plaintiffs are entitled to sue for the balances due on the block account and the interest account.

(4.) Whether Plaintiffs are entitled to bring their suit before submitting to arbitration the dispute as to Rs. 12,789. 1. 11 on account of interest.

(5.) A similar issue as to the before mentioned sum of Rs. 2,979. 1. 8, the remainder of the sum claimed by the Plaintiffs as a cash payment payable as on the 30th of June 1875.

This District Judge, Mr. Wigram, in a very careful and able judgment, disposed of these issues as follows:—

Upon the 1st, he found that, on the true construction of instruments of mortgage I and J, they and the deeds deposited with them constituted a security for the general balance due from the Defendants to the Plaintiffs.

Upon the 2nd, he found that that balance was on the 30th of June 1873 the sum of Rs. 6,13,007. 6. 5.

Upon the 3rd, he found that the agreement of the 2nd of January (L) was, upon the true construction of it, revocable at will by the Plaintiffs, but that, if it were not so revocable they had failed to prove any breach of it on the part of the Defendants which justified the rescission of it.

As to the 4th and 5th issues, he found that the Plaintiffs were not entitled to sue for the disputed amount of interest until that dispute had been settled by arbitration; but that there was no such objection to the claim for the Rs. 2,979. 1. 8, the amount, and the Defendants liability for it, in some way or another, not being in dispute.

The result of his judgment was that the Plaintiffs were entitled to a decree for Rs. 3,92,990. 12. 10, and to a declaration that, if that amount was not paid within three months, the Plaintiffs were entitled to sell the right, title, and interest of the Defendants in the properties mortaged to them under the Exhibits I and J, and a decree was made accordingly on the 16th of July 1877.

From this there was an appeal, and, so far as it related to the 4th issue, a cross appeal, to the High Court, which dismissed both appeals, and confirmed the decree of the Lower Court in its integrity. The judgment of the High Court appears, from the somewhat scanty note of it, to have proceeded, so far as it related to the 3rd issue, upon the supposed proof of actual breaches of the agreement L on the part of the Defendants, and not upon the revocability of that agreement at the will of the Plaintiffs.

In dealing with this appeal, their Lordships are relieved from any further consideration of the 2nd and the 4th issues. What has been already said sufficiently indicates their entire concurrence in the finding of the two Indian Courts upon the former. And there is now no

cross appeal against the finding in favour of the Defendants upon the latter.

The questions, therefore, for determination are reduced to the following :—

1st. Whether the finding upon the 1st issue is correct; a question which depends upon the construction to be put on the document I, since that governs also the effect of J.

2ndly. Whether the Plaintiffs were entitled to rescind wholly or in part the agreement embodied in document L, without proof of an actual breach of it by the Defendants sufficient to justify such rescission ; and

3rdly. If they were not so entitled, whether there is sufficient proof of any such breach.

4thly. Whether there is error in the decree, in so far as it declares the Plaintiffs at liberty to sell the mortgaged premises, if the Defendants should not pay the amount decreed within three months.

The contention of the Defendants is that the construction of I is to be governed by the first paragraph in it, which, speaking in the name of the 2nd Defendant, says,—

"As I have been and am now accustomed to contract with you for the supply of country produce and other merchandise, and in the course of these transactions there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts, and you very naturally would like some security, I agree to the following propositions, &c."

They insist that this statement, being in the nature of a recital, limits the security to advances made upon contracts for future deliveries of produce, and consequently must exclude from it the advances, to the amount of five lacs, which constitute so large a portion of the balance found due to the Plaintiffs, particularly if Spitteler's statement, to the effect that when those advances were made all, or almost all, of

the Defendants' contracts with the Plaintiffs up to that time had been fulfilled, is to be taken to be correct.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

The distinction is recognized and the authorities on this subject collected in the case of Walsh *v.* Trevanion, 15 Q. B. 750.

What, then, is the effect of the operative part of this instrument. It says,—

"You shall hold them (the deeds) as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property as a pukha mortgagee would have, only you must agree not to sell any of it until you have given me full twelve months' notice from *the time we shall come to a settlement of accounts to pay up*, or from the time demand shall have been made by you of the amount claimed by you; but if I fail, then you may sell, at my expense, for the best price you can get, any of the properties successively, *till you have satisfied my account current, out of the proceeds*, giving me a strict account of what you sell." And the next paragraph contains the following sentence: "And upon my payment *of all balances due*, you will at once return to me all the documents now deposited with you, and cancel this letter."

The conclusion which their Lordships draw from the above passages taken together, and examined by the light which the proved relations of the parties at the time throw upon them, is, that the security was intended to cover the general balance that might become due from the Defendants to the Plaintiffs upon all the accounts between them. The words "upon our contracts," which the Defendants insist can only be taken to mean the particular contracts for the delivery of produce referred to in the paragraph in the nature of a recital, do not appear to their

Lordships to be necessarily repugnant to this construction. Such contracts may have been chiefly in the minds of the parties, but the words themselves are wide enough to embrace all their transactions. And what follows strongly favours the wider construction. There is to be no sale until twelve months after one of two events, viz., a settlement of accounts or a demand. The first case implies a settlement of accounts in order to ascertain the amount due. How could that be ascertained unless all the different accounts were brought into a general account current, and a balance struck thereon? Let it be supposed that "the purchase account" taken alone showed a large balance due for advances. It can hardly have been the intention of the parties that the property should be sold to pay that balance; if, on the other hand, a balance was due from the Plaintiffs to the Defendants on "the consignment account;" and this explains the following sentence, "if I fail, then you may sell, &c., until you "have satisfied *my account current*." The "account current" would include both accounts. And this intention is made still more clear by the subsequent stipulation that the event on which the deeds shall be returned and the latter cancelled is the payment of *all* balances due. Again, let it be assumed that there was no account open between the parties except "the purchase account." The advances were entered generally to the debit of the Defendants in this account, as on the dates on which they were made, in round sums. Neither this, nor any other account that has been produced showed what particular advance was made on each particular contract. The five lacs were entered in this account in the same manner as the sums previously advanced. It can hardly have been intended that if it should prove necessary to

realize the securities, the account so kept was to be analysed and recast in order to ascertain which of the sums so debited were secured, and which were due upon open account.

The learned Counsel for the Defendants have relied upon their refusal to execute S. S. S., one of the abortive proposals made in the course of the negotiations for a settlement between February 1873 and January 1874. Whatever may have been the motive of the refusal (and this has not been very satisfactorily proved), parol evidence of what took place a considerable time after the execution of I can hardly affect the construction of that document. If it could have any such effect, the evidence of what took place during the long negotiation which ended in the execution of L, would, taken as a whole, rather lead their Lordships to the conclusion that both parties were negotiating under the belief and upon the assumption that the whole debt then due was covered by the mortgage securities.

Upon the whole, therefore, their Lordships have come to the conclusion that the Judge's finding on the first issue before him was correct, and that the whole of the before-mentioned sum of Rs. 6,13,007. 0. 5 was, and that the balance of it now recoverable is, secured by the mortgage securities in question.

Their Lordships have now to determine the more difficult question of the construction and effect of the document L (p. 91).

The contention on the part of the Plaintiffs is that it was revocable at their will, as found by the District Judge. The contention of the Defendants is that, unless rescinded by mutual agreement, or upon a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation

under it of both the "block" and the "interest" account, or, at all events, of the block account; and further that, if in the events that have happened, the Plaintiffs are entitled to sue for and recover the balance due on "the interest account," they cannot sue for or recover the balance due on "the block account," as to which they have agreed that it was to be liquidated by "returns only."

The circumstances under which the agreement was entered into have already been partially stated. That they afford no ground for the suggestion that the settlement in question proceeded upon the compromise of a doubtful claim, or of a disputed debt, is a conclusion in which their Lordships have already intimated their concurrence. On the other hand, it is clear that, although the arrangement was on the face of it in ease and for the benefit of the Defendants, the Plaintiffs found, or thought they found, their own advantage in it. Had they shown no forbearance, had they driven the Defendants to extremity, they would probably have lost great part of the large sum then due to them, and they would certainly have lost the advantage which they expected to reap from the employment of the Defendants, who were supposed to have acquired the command of the market, in their future operations in native produce. The agreement actually made is extremely loose. It fixes no time for its duration, or for the liquidation of the debt. It was, no doubt, purposely left vague upon this point; since one of the grounds on which the second Defendant says he objected to execute S. S. S. was that it bound him to pay a certain amount by a fixed time.

The only specified date from which any inference as to the intended duration of the arrangement can be drawn is the 30th of June 1875. From that it may fairly be inferred that the parties contemplated dealing on the footing

of the agreement up to that time at least. But all beyond that time is left indefinite.

The Defendants, however, contend that it follows, by necessary implication from the terms of the document, that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until the whole debt, or, at all events, that portion of it which was carried to the block account, was liquidated in the manner thereby provided. The passages on which they mainly rely are,—

1st. The statement that "the following conditions have been agreed upon by both parties for the repayment by P. Marcar of the money due to Volkart Brothers."

2nd. The provision as to the rebate of interest, which contains these words,—"The same reduction of interest to be made subsequently *until the entire settlement of this account* should P. Marcar continue to afford the same satisfaction."

3rd. The provision that "the block account shall be liquidated *by returns only* on all contracts," &c.

Their Lordships are clearly of opinion that the extreme contention of the Defendants that the whole debt was to be repaid under the agreement, which was, therefore, to subsist until that liquidation had taken place, cannot be maintained. The "interest account" stands upon a different footing from the "block account." It was to remain as a debt carrying interest, and that interest was to be paid annually, but no precise stipulation as to the mode of liquidating the principal is to be found in the agreement, unless it is to be inferred from the 5th paragraph that, for the future as for the past, sums of money to become due to P. Marcar for cash, goods, consignments, &c., were to be carried to their credit. There was, however, no provision

for the continuance of the consignment business, which would presumably be the principal source of such credits. Hence, even if the agreement was intended to subsist, and did in fact subsist, until the block account had been liquidated by the returns, there might have remained at that time a balance due on the interest account which the Plaintiffs would have been entitled to sue for and recover.

And it further appears to their Lordships that, as regards the balance due on the "interest account," the utmost that can be implied from the agreement against the Plaintiffs is a covenant not to sue for it until after the 30th of June 1875.

The question, then, under consideration, is reduced to the "block account," and the effect of the words "shall be liquidated by returns only," &c. Now, even as to this account, the provisions are extremely loose, and such as could not be duly worked unless the contracting parties continued to act with the highest good faith, and on a perfect understanding with each other. Nevertheless, they seem advisedly to have abstained from making express provisions either for the continuance or for the due working of the agreement, each trusting to the honour, and, probably, still more to the self-interest of the other. Such an agreement is conceivable if it was intended to endure so long only as both parties desired it to continue. But, for the effectual working of an irrevocable agreement for the liquidation of the block account in a particular way, it would be necessary to imply covenants and obligations for which the parties have failed, apparently from the difficulty of agreeing upon them, to make express provision. For example, no express provision is made as to the extent of the business to be done; the rates at which one party is to offer,

and the other to accept, produce ; the result upon the letter of the agreement being that, if either were disposed to act unreasonably, he would have the means of postponing the liquidation of the account indefinitely. And if the parties have thus abstained to insert express provisions for the fair and reasonable working of their supposed agreement, can the Court, which is called upon to enforce it, supply them. Their Lordships are of opinion that it cannot do so. Among the reasons stated by Lord Denman, C. J., in delivering the judgment of the Court in Aspdin *v.* Austin, 5 Q. B., 671, are the following, which appear to be particularly applicable to this case ; he says :—

" Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written ; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These considerations have led their Lordships to the conclusion that the stipulations, even as to the block account, were binding only during the continuance of the arrangement for the conduct of future business, and that, on the true construction of the agreement, either party had power, at least after the 30th June 1875, to determine it, should it be found, as undoubtedly it was found

to be working unsatisfactorily. They had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures, the Defendants supplying the produce at a profit to the Plaintiffs, who realized a further profit on its export to Europe, and the former undertaking further that a portion of their profits should be applied in liquidation of their liability on former transactions. Their Lordships conceive that on this construction full effect can be given to all the express stipulations contained in L, and, further, that in the events which have happened the Plaintiffs have not lost their right to sue for and recover the balance due to them either on "the block" or on "the interest account." In truth, had they broken any covenant, express or implied, the remedy of the Defendants would seem to have been an action for unliquidated damages, the measure of which would not necessarily be the balance due on the block account.

Their Lordship's construction of L renders it unnecessary to consider whether, assuming the agreement to be irrevocable, the Plaintiffs have established a breach of it on the part of the Defendants which would justify the rescission of it, a question which, regard being had to the conduct of the parties with respect to the alleged breaches, might not be free from difficulty. Upon the last point their Lordships find that there is no error in that part of the decree which empowers the Plaintiffs to realize their securities in case the Defendants should fail to pay the sum due within three months from the date of the decree. They are of opinion that a sufficient demand, within the meaning of the letter I, was made immediately before the institution of the

suit, and was so understood by the Defendants to have been made. Such seems to be the result of the letters of the 8th of December 1875. The allowance of three months for the payment of the sum decreed to be due to the Plaintiffs on the mortgage securities was therefore in ease of the Defendants. Their Lordships will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

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