Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of De Waal v. *Adler, from the Supreme Court of Natal; delivered* 11*th December* 1886.

Present:

LORD HOBHOUSE.
LORD HERSCHELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

The Respondent, Henry Adler, a sharebroker residing at Cape Town, brought an action in the Circuit Court of Durban against the Appellant, a merchant in Durban, on three contracts for the sale and purchase of shares in the Rose Hill Gold Mining Company, the first contract being made on the 15th of December 1883 for the purchase of three shares, the second on the 8th or 9th of January 1884, for the purchase of four, and the third on the 20th of February 1884 of three. And in his declaration he claimed 925*l.* "in ex- "change for said shares, or otherwise the differ- "ence between 925*l.* and the price for which "such shares may be sold." The plea denied all the material averments in the declaration, and also alleged that on the 18th of February 1884 it was agreed between the agents for the vendor of the shares and the Defendant that the delivery of the ten shares should be made on the incoming of the next mail steamer, that the incoming mail steamer arrived on the 27th of February, and the ten shares were not delivered,

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and that the Plaintiff did not deliver any shares or scrip until the 10th of March 1884, when he tendered the said shares or scrip, and the Defendant refused to accept them.

It will be convenient first to dispose of this part of the defence. It was true that the ten shares were not delivered on the arrival of the incoming mail steamer, and no tender of shares was made until the 10th of March 1884. Mr. Justice Wragg, who tried the case in the Circuit Court, found that the Defendant's agents on the 20th February rescinded the original contract as to the seven shares, the two contracts being treated as having become one, and substituted a contract defeasible by non-delivery by the next steamer of a certificate for ten shares. And he held that, even if it were conceded that the original contract as to the seven shares was not rescinded or varied on the 20th of February, the Defendant would be entitled to an absolution from the instance on the ground that the delay in delivering the seven shares was unreasonable, and gave a judgement accordingly. On appeal to the Supreme Court of the Colony of Natal, the Chief Justice and Mr. Justice Cadiz were of opinion that the contract for the seven shares was not rescinded or varied and another contract for ten shares substituted for it, and that the Defendant was not liable for the three shares sold on the 20th February. So far their Lordships think they were unquestionably right, but they proceeded to hold that he was liable for the seven shares. The reason given by the Chief Justice was that by the law of the colony, where no day is fixed for the completion of a bargain, there is no delay in the sense of *mora* unless the person charged with delaying is to blame, and he did not see that the Plaintiff was blameable for any delay that occurred. Mr. Justice Cadiz thought there had not been any unreasonable

delay, and Mr. Justice Wragg adhered to his former judgement. Therefore, the Court gave judgement for the Plaintiff for the price of seven shares at 85*l.* per share upon his giving delivery of shares to the Defendant.

It is unnecessary for their Lordships to give any opinion upon the objection which was made by the Counsel for the Appellant, that this judgement for a specific performance of the contracts was not authorized by the law of the colony of Natal.

The questions which they have to decide are, whether there was an unreasonable delay in the delivery of the certificate for the seven shares, and, if there was, whether the Plaintiff was to blame for it. The facts proved are these. The Plaintiff, Henry Adler, a sharebroker and merchant in Cape Town, on the 15th of December 1883 held 46 shares in the Ross Hill Mining Company, one certificate of 40 shares and one of six. The office of the Company was in London. On the 6th of December he handed the certificate of 40 to his brother, to be sent to England for subdivision into certificates for smaller numbers, which did not reach Cape Town until the 19th of March 1884. The other six shares were transferred to one of the purchasers of the 12 shares afterwards mentioned, and need not be further noticed. On the 15th of December 1883 William Henry Adler, a merchant in Durban, of the firm of Adler Brothers, received from Wallis Short, as agent for then undisclosed principals, an offer to buy 12 shares in the Ross Hill Mining Company, at 85*l.* per share; William Henry Adler on the same day, as agent for the Plaintiff, who was also undisclosed, accepted the offer, and telegraphed to him from Durban, "We "(Adlers) have sold twelve Ross Hill at eighty-"five cash, delivery of scrip here. Confirm by "wire." The telegram in reply is not in the

record, but it appears from a telegram from Adler Brothers to the Plaintiff, on the 4th of January 1884, that on the same day the Plaintiff confirmed the sale by telegram. On the 21st of December Mr. Short, in a letter to Adler Brothers, declared his principals, one of them being the Defendant, for three shares. About the 5th or 6th of January 1884 the Defendant authorized Adlers to buy three more shares, at 85*l*. On the 8th he went from home for the benefit of his health, and left a cheque with his book-keeper for 510*l*. for the six shares. On the 9th W. H. Adler wrote to him that they had not been able to get less than four shares, and had bought them for him at 85*l*. a share, and requested him to instruct his book-keeper to pay 595*l*. when required. He, by a letter undated, but written on the 11th of January, agreed to take the four shares, and immediately forwarded to the book-keeper an additional cheque for 85*l*. Mr. W. H. Adler said, on cross-examination, he did not know that the shares had to be sent to England to be subdivided, and at the time of the sale he thought the shares were deliverable within a short time. It is clear from the Defendant's conduct that he also thought so, and he did not know that the certificate of the 40 shares had been sent to England. He returned home about the 22nd of January, and finding that the shares had not been delivered or the cheques called for, he complained of the delay, and continued to do so up to the 18th or 19th of February, when he was told that the Plaintiff had a certificate for ten shares, and he agreed to take the remaining three at 50*l*. a share, on condition that a certificate for ten shares should be delivered to him by the first steamer, which it has been seen was not done.

These contracts were not for the sale of specific shares, and might have been performed by the

delivery of one or more certificates, comprising altogether the number of shares sold. The seller was bound to deliver the certificates within what would be a reasonable time in an ordinary contract for the sale of shares, and the reasonableness of the time cannot depend upon circumstances which were unknown to the buyer, and were not disclosed to him by the seller. Assuming that the right to complain of delay in delivery under the first contract was waived by the second, and that the time for the delivery of the whole seven shares was to date from the 9th of January 1884, there was certainly an unreasonable delay. Mr. Woolf, the partner of W. H. Adler, and who transacted the sale of the three shares on the 20th of February, said, in his evidence, that he told the Defendant he had a perfect right in his opinion to refuse delivery, and so wired to Mr. Henry Adler. This telegram was sent on the 29th of February, and was as follows :—" We (Adlers) shall only honour your " draft if we are sure De Waal will accept. He " is certainly entitled to refusal." The offer of the seven shares by the letter of the attorneys of the Plaintiff was not made till ten days afterwards. This was the opinion of a man of business, and it does not appear that the Plaintiff sent any reply to it. Their Lordships consider there was an unreasonable delay.

It remains, then, to consider the reason of the Chief Justice. As to that their Lordships observe that Mr. Justice Wragg did not take that view of the law, nor, apparently, did Mr. Justice Cadiz. The Chief Justice says, " *Mora* is defined to be " unjust omission in one rightly required to " perform his obligations." It may be that the question of *mora* arises only where damages are sought for a breach of contract. It is not necessary to decide whether it does so, for, assuming that the law as stated by the Chief Justice is

applicable to this case, their Lordships are of opinion that there was an unjust omission on the part of the Plaintiff in the sense in which these words are used by the Chief Justice, and they cannot agree with him that the Plaintiff was not blameable for a delay which was caused by his having parted with the documents of title. They will therefore humbly advise Her Majesty that the judgement of the Supreme Court should be reversed, and the appeal to that Court be dismissed with costs. The Respondent will pay the costs of this appeal.