

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Mercantile Bank of Sydney v. Taylor, from the Supreme Court of New South Wales, delivered 13th May 1893.*

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Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD SHAND.

HON. GEORGE DENMAN.

[*Delivered by Lord Watson.*]

By bond dated the 17th July 1885, the Respondent John Taylor became one of five joint and several sureties for a cash credit to the amount of 10,000*l.*, which the Appellants, the Mercantile Bank of Sydney, agreed to allow to the Australasian Powder and Explosives Manufacturing Company. The liability of the co-sureties, in so far as related to principal moneys, exclusive of interest or costs, was restricted to 8,000*l.*

The Company subsequently went into liquidation, owing a large balance upon account current, which was partly covered by securities deposited with the Bank. On the 4th May 1888 the Appellants made a demand upon each of the five sureties for payment of 10,357*l.* 16*s.* 11*d.*, being the amount, with interest to date, of the principal debtors' overdraft. This action was

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brought by the Appellants, in June 1890, against the Respondent, before the Supreme Court of New South Wales, for the purpose *inter alia* of recovering from him, as surety, the amount of the over-draft, which had, by that time, been considerably reduced by realization of the principal debtors' securities.

The only defence stated for the Respondent which was referred to in the argument upon this appeal was founded on the allegation that the Appellants had, without his knowledge or consent, agreed to release John George Griffin, one of his co-sureties, and had thereby materially altered the contract to which he became a party in July 1885. In replication, the Appellants pleaded that Griffin's co-suretyship with the Respondent was not within the terms of the release; and they specially averred that it was a term of their agreement with Griffin that all the rights and remedies of the Bank against the Respondent and the other co-sureties were to be reserved, and that such rights and remedies were not to be prejudiced or affected. Under that plea, the Appellants maintain that Griffin, though discharged from liability in a question with the Bank, agreed to remain, and still remains liable in contribution to any of his co-sureties who may pay up the whole or part of the balance still due to the Bank by the Australasian Powder and Explosives Manufacturing Company.

The case was tried before Mr. Justice Stephen and a jury, who returned a verdict for the Respondent. Leave was, of consent, reserved to the Appellants to move the Court to enter a verdict in their favour for 5,650*l.* 16*s.* 9*d.*, which the parties agreed was the amount of the balance then due by the principal debtor.

It was proved at the trial that Griffin, besides his suretyship for the Australasian Company, had other dealings with the Appellants,

both as principal and as guarantor, and was largely indebted to them on several accounts. He had become apprehensive that the Appellants might take measures for enforcing these liabilities which would seriously affect his position as a member of the Sydney Stock Exchange; and there had been verbal communications between him and the Bank authorities with a view to an amicable settlement. These negotiations had not led to any definite result; and, on the 27th March 1889, Griffin sent a letter to Mr. Wilson, the General Manager of the Bank, in these terms:—

“Referring to the proposal made by me, and which I understand is agreed to by you, on behalf of the bank, viz., that I should assign to the bank all my equities in the various securities held by the bank on my behalf, in consideration of receiving from the bank a release of my present indebtedness to it.”

“I now request you to take the necessary legal steps to carry out this proposal &c.”

The Bank declined to accept the proposal thus made; and, on the 5th April 1889, the General Manager wrote to Griffin as follows:—

“Referring to our conversation, I have to inform you that my directors are willing to grant you a release *from all debts due by you to the bank at this date*, on condition of your conveying to the bank, within one month from this date, all other real estate which you may be entitled to, and within the same time conveying to the bank your equity of redemption in and to all the mortgage and other securities now held by the bank from you for moneys now due by you to the bank.”

That letter was handed by the Bank Manager to Griffin, who verbally intimated his acceptance of the offer which it contained, in these terms:—

“It takes a little more than I intended, but I am content.” It was then agreed that, in order to

save expense, the Bank's solicitors should prepare the necessary documents, and carry out the arrangements thus concluded. Griffin stated in the witness box that there had been delay in completing the settlement, which was not imputable to him; and,—apparently in order to supersede the necessity of carrying the inquiry further,—the parties made the following admission before the jury:—"It is admitted that Griffin did convey to the plaintiffs his equity of redemption in and to certain of the said mortgages and other securities, and conveyed certain portions of his said real estate to the plaintiffs, and the plaintiffs then accepted and now hold the same."

In the course of Griffin's examination, the Appellants' Counsel, without putting any question, moved the presiding Judge for permission (1) to interrogate the witness for the purpose of proving by parol, "that there was an agreement to reserve rights against the sureties"; and (2) to interrogate him as to conversations "to explain the meaning of the word 'indebtedness.'" The learned Judge rejected the evidence tendered on both points.

The Appellants obtained a rule to show cause why the verdict of the jury should not be set aside and a verdict entered for them for 5,650*l.* 16*s.* 9*d.*, pursuant to leave reserved, or why a new trial should not be granted. The reasons assigned in the rule were that the presiding judge had erred, (1) in excluding evidence of conversations between Griffin, the Manager of the Bank, and the Chairman of the Board of Directors, prior to the Bank's letter of the 5th April 1889; and (2) in holding that the liability of Griffin, as co-surety with the Respondent, came within the definition of the words "indebtedness" and "debts" in the letters of the 27th March and 5th April 1889.

The Court, consisting of Windeyer, Innes, and

Manning, J.J. upheld all the rulings complained of, and discharged the rule with costs. Their Lordships, in the circumstances of this case, have had no difficulty in agreeing with their decision.

If the Appellants' case had rested upon the notes of what occurred at the trial, it might have opened a very wide field of discussion; because, in that case, the onus might have been upon the Respondent to show that no parole evidence could by possibility be competent. But the controversy is narrowed by the terms of the rule, which limit the evidence tendered to proof of previous verbal negotiations, for the purpose of adding a new term to the written contract of the 5th April 1889, and of putting a construction upon an expression occurring in that contract which it does not naturally bear.

It appears to their Lordships that no foundation was laid at the trial for the admission of any such evidence as the Appellants proposed to adduce. It had been proved that the whole terms of the agreement under which Griffin became entitled to his release were embodied in the Bank's letter of the 5th April 1889, which he accepted without reservation or qualification. On that assumption, it is plain that the previous verbal communications which had passed between him and the Bank were completely superseded, and could not be legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its ordinary legal construction. But that is what the Appellants proposed to do, without attempting to impeach the testimony which established that their letter of the 5th April 1889, accepted by Griffin, constituted the sole contract between them.

Upon the question whether the balance owing by the Australasian Powder and Explosives Manufacturing Company, of which the Appellants had demanded payment from Griffin as one of

their sureties, was a debt due by him to the Bank within the meaning of the letter of the 5th April, their Lordships have nothing to add to what was said by the learned Judges in the Court below.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The Appellants must pay the costs of this appeal.

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