Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of De Comas v. *Prost and others, from New South Wales; ~~to be~~ delivered 29th March,* 1865.

Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
SIR EDWARD V. WILLIAMS.

THE appeal in this case was against a rule for a new trial, made absolute by the Supreme Court of New South Wales. The learned Judge before whom the cause was tried laid down to the jury as matter of law that by the mere relationship of factor, the factor did not by making advances either at the time or subsequently acquire any right, in derogation of the rights of the principal, to give directions as to the time and manner of sale, and any such right on the part of the factor must be made out by an agreement which might be inferred from the evidence, or might exist impliedly by the proof of usage. The jury found that there was no such agreement or usage; that there was unreasonable delay in the sale; that it was not in the exercise of a sound discretion; that the value of the sugar was 24*l.* a ton; and the verdict was thereupon entered at the suggestion of the Judge on the Trover count for the value of the sugar, as found by the jury, with nominal damages on the others.

The majority of the Court below seem to have founded their decision on a supposed misdirection of the Judge in not telling the jury that on the undisputed evidence they ought to find for the Defendants, inasmuch as they were shown by the letter of the 3rd May, 1862, or by that letter in conjunction with

the previous conversations and circumstances, to have had conferred on them an irrevocable authority to sell the sugars (or such portion of them as should be necessary) in order to repay themselves the amount of their advances, so as to constitute them special agents for a valuable consideration with that power, and not merely factors. If this did not amount to a misdirection, the majority of the Judges below appear to have thought that at all events there should be a new trial, because the verdict was against the weight of evidence, especially in finding, as it did in effect, that there was no agreement or understanding that the authority to sell should be irrevocable.

Their Lordships are of opinion that there was no misdirection; for that the decision in Smart *v.* Sandars (5 C. B. 895), and the principle on which that decision was founded, justify the mode in which the case was left to the jury. It appears to their Lordships that mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot, according to the doctrine of that case, have the effect of altering the revocable nature of the authority to sell, unless such advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable. It therefore became necessary to inquire, on the trial of the present case, whether any such agreement was shown to have been made, or might properly be inferred from the circumstances. And this, in the opinion of their Lordships, was rightly left as a question for the consideration of the jury. The undispnted facts did not necessarily lead to any such conclusion. The jury had to consider as a question of fact whether the advances were made under such circumstances as might justly lead their minds to infer that they were made on the footing of an agreement that Defendants should have an irrevocable authority to sell, in case the Plaintiff made default. The jury thought proper to answer this question in the negative. But they were wrong in so doing according to the opinion of the majority of the Judges in the Court below. Their Lordships have fully considered the ground expressed by those Judges for their opinion, and also the reasons given by the dissentient Judge for thinking that the verdict ought to stand. Looking at all

the circumstances attending the advances (which their Lordships agree with the Court below in regarding as all placed on the same footing), and the conversations and letters which preceded and followed them, their Lordships cannot say the Court below was wrong in considering the weight of evidence in favour of the Defendants to have been so great as to make it improper that the verdict should stand without a further investigation before another jury.

Their Lordships will therefore humbly report as their opinion to Her Majesty that the Judgment below should be affirmed, but without costs.