

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the South African Association for the Administration and Settlement of Estates v. Marthinus Christoffel Botha, from a Judgment of the Supreme Court of the Cape of Good Hope ; delivered 7th March, 1860.

Present :

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

AT Cape Town on the 4th of February, 1852, the Association which, by its Secretary, Mr. Denyssen, is the Appellant in this case, advanced to Mr. Ryk le Sueur, a merchant and general agent of that place, a sum of 600*l.* by way of loan at interest. The loan, however, was not made, or professed or intended to be made to Mr. Le Sueur on his own account. It was made to him in the character of agent for the Respondent, a farmer in the Colony of the Cape of Good Hope, and as on the account and for the use of the Respondent ; but the Respondent having denied his liability to the Association, the suit that has produced the present appeal was, in the year 1857, commenced in the Supreme Court of the Colony by Mr. Denyssen, on behalf of the Association, against the Respondent, for the purpose of recovering the 600*l.* with interest, and also a small sum of 2*l.* and a fraction alleged to have been paid for premiums of insurance on his account. The action was defended, a jury dispensed with, and evidence adduced on each side. After argument, judgment was, in June 1858, given by the Supreme Court in favour, to a limited extent at least, of the Plaintiff, in these terms :—

“ And be it further remembered that afterwards, that is to say, on the seventeenth, eighteenth, twenty-first, and twenty-second days of June, in the year of our Lord one thousand eight hundred and fifty-eight, at Cape Town, before the Honourable Sir William Hodges, Knight, Chief Justice of the Colony of the Cape of Good Hope, and other the Judges of the Supreme Court of the said Colony, come the said parties, their counsel, and attorneys, and thereupon having heard counsel for the parties respectively, and duly considered the evidence adduced in this case, the Court now, on this twenty-second day of June, in the year last aforesaid, gives judgment for the Plaintiff in the sum of one hundred and seventy pounds, nine shillings, and nine pence sterling, with interest thereon from the date when the said sum was received by the said Defendant (to wit, the fourth day of February, one thousand eight hundred and fifty-two), less the sum of twenty-seven pounds received on account, and doth reject the claim for the balance or remainder of the said sum, demanded by the said Plaintiff, and the said Court doth further adjudge that each party do pay their own costs of suit.”

From this the Defendant (Respondent here) has not appealed. The appeal before us is that of the Plaintiff in the action, insisting that he ought to have had judgment for his full demand, or nearly so, according to the opinion of one of the Judges, Mr. Justice Cloete. And mainly, if not solely, the question upon the present appeal is whether the advance of the 600*l.* by the Association to Mr. Le Sueur was, in effect, an advance of that sum to the Respondent, rendering him liable as a debtor to the Association for the amount, with interest on it.

The matter arose thus : The Respondent and his brother were, before and in the year 1852, by a title substantially good as it seems, though not formally or regularly complete, the owners of a farm called Voorburg, not far from George Town, in the Colony. The Respondent seems to have been at that time the sole occupier and cultivator of this farm ; but as to his brother's share, probably in the character of the brother's tenant, or not adversely to him. A neighbouring parcel of land having been advertised to be sold by the Government, late in the year 1851, or early in 1852, the Respondent was desirous of purchasing it, but seems not to have had ready money enough to pay the probable price, and he applied on the subject to a notary or agent, called Rattray, living in George Town. And as the sale was to be at Cape Town, and money appeared likely to be obtainable there, Mr. Rattray communicated upon the matter with Mr. Le Sueur, to whom he

wrote three letters, of which extracts are given in page 12 of the Appendix. Those extracts are thus:—

“January 20, 1852.

“Inclosed I send you a diagram of Mr. M. C. Botha, with certificate and power to obtain a loan of 500*l.* or 600*l.* He is well off *himself* in PROPERTY, but he requires a little cash for some express purpose, and I trust no difficulty will be found to get the money.”

“Do your best to get the money for Botha, as it is wanted immediately. His farm is one of the best in the Colony.”

“January 27, 1852.

“I received your communication of the 24th instant, with its inclosure, but as Botha lives some distance from town, I am not able to send you the required papers, which he will readily sign. Of my own knowledge, and every one else, however, I do not see the use of them, as the old man is still married to his first wife—is security for no one, and never signed any ‘kinderbewijs,’ or any such document, by which he has made himself liable, and I hardly see the use of the documents you write for, *but I will, however, send them by return of post.*”

“February 5, 1852.

“Inclosed I send you a Government Notice of Sales of Crown Land, advertised for sale on the 14th instant, and which will be holden on the Stoep of the Commercial Exchange, in Cape Town, on that day, and I request that you will be good enough to purchase the lot marked in brackets ‘Lot No. 1,389,’ upset price 2*l.* per acre. I believe there will be, according to report, a good many competitors; but *coute qui coute*, Botha must have it, as he cannot exist without it.”

In consequence of the first letter and before the second, Mr. Le Sueur appears to have applied to the Association to make an advance of money by way of loan to the Respondent, on the security of the Voorburg farm, which security, by way of mortgage or mortgage-bond, Mr. Le Sueur seems to have represented himself to the Association as able, under a power of attorney from the Respondent, to effect.

Their answer to him, and a subsequent communication from him to Mr. Rattray, seem to have produced the second letter, that of January 27. Between that and the third letter, the Association advanced the 600*l.* to Mr. Le Sueur, who, between the receipt of the letter of January 20, and his receipt, on the 4th of February, 1852, of the money from the Association, appears for the purpose of obtaining it, to have produced to the Association the documents marked respectively D, B, and A, which are given in pp. 11 and 9 of the Appendix. Of

these, it is plain enough that the Respondent's signature in his own handwriting was on two; namely, on A and B. The other, D, namely, a power of attorney having written on it the date of January 19, 1852, may not or may have been, in truth, signed by him; but when he did sign it, if he signed it at all, there were important blanks in it; and there can be no doubt, that by the law of the Colony, both that instrument and the power of attorney from him, contained in the document marked B, having been respectively attested only as they were (for Fivaz was, in truth, no witness at all), were respectively, as powers to give a mortgage-bond or to effect a mortgage, ineffectual and invalid. The Respondent never legally, never effectually, either made a mortgage or mortgage-bond, or authorized one to be made. The power of attorney, which he certainly signed (the second, namely, of the two alleged powers), was in these terms:—

“I, the undersigned *Marthinus Christoffel Botha*, do hereby nominate and appoint *George T. Rattray*, of George Town, with power of substitution, for me and in my name, to effect a loan and to mortgage my place Voorburg, for such amount as he may obtain for me, and to pass a bond for the same, promising to approve of such steps as he may take on my behalf.

“George Town, January 28, 1852.

(Signed) “M. C. BOTHA.”

“As Witnesses:

(Signed) “E. BERGH.”

To this document was added one signed by Mr. Rattray in these terms:—

“I do hereby substitute and appoint *RYK LE SUEUR*, of Cape Town, to act for me as above.

“George Town, January 28, 1852.

(Signed) “GEO. RATTRAY.”

“As Witnesses:

(Signed) “S. GOLDSBURY.”

“J. G. ASPELING.”

Each of these two is in the paper marked B.

The document marked A produced by Mr. Le Sueur to the Association was thus:—

“I, the undersigned *Marthinus Christoffel Botha*, do hereby, in regard to the loan applied for by me to the *South African Association for the Administration and Settlement of Estates*, of a capital of *six hundred pounds* sterling, under mortgage of the fixed property called *Voorburg*, situated in the district of *George*, more fully described in a Government grant to me, dated *1st December, 1816*,—solemnly declare it to be the truth

that my marriage with Elizabeth Margaretha Koen, is the first and sole ever contracted by me;—that my wife, said Elizabeth Margaretha Koen, is still alive, with whom I am married in community of property in the fullest meaning, and without any exception or reserve; that I am not entrusted with any guardianship of children not related to me; nor have under my charge or control any moneys belonging to minors, and that I am neither directly nor indirectly responsible for such moneys; that I am not charged with the collection of any moneys belonging to Government, or any Municipal or other Local Administration; and lastly, that no person whatsoever has any right of tacit legal hypothecation, of whatsoever nature, on my property. And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of the Ordinance No. 6, 1845, entitled ‘ An Ordinance for substituting declarations in the place of certain oaths, and for the suppression of voluntary and extra-judicial oaths and affidavits.’

(Signed) “ M. C. BOTHA.”

“ Declared before me,
“ this 28th January, 1852,
“ E. BERGH, Jus. P.”

“ A true translation,
“ A. FAURE, Z.s., Tr. to the Sup. Court.”

It must be taken that on the basis and upon the faith of all these documents the Association accepted a mortgage for 600*l.* of the Voorburg farm, ineffectually made by Mr. Le Sueur in the character, whether really or not really existing, of attorney for the Respondent under the first alleged power, and advanced the 600*l.* in question; nor can it be reasonably doubted that the Association, whether acting prudently or imprudently, advanced the money fairly and in the belief that they were paying it to Mr. Le Sueur for the Respondent’s use, and by the Respondent’s authority. It appears, further, that in the same month of February 1852, Mr. Le Sueur, under the letter of the 5th of February already mentioned, made the purchase of the land to which it refers—a purchase recognized by the Respondent in his deposition contained in pages 14, 15, and 16 of the Appendix. The purchase-money, amounting to less than 200*l.*, was paid by Mr. Le Sueur, who retained the amount out of the 600*l.*, accounting for the rest to Rattray, who seems not to have accounted to the Respondent. The Respondent appearing to have taken the benefit of the purchase, it was in respect of the purchase-money so paid by Mr. Le Sueur that the judgment under appeal was against the Respondent, so far as it was against him. This was the state of things that, as their Lordships view the matter, was

before the Supreme Court of the Cape of Good Hope in the suit in which the pleadings are set forth in the Appendix, pages 3, 4, 5, and 6, and from the judgment in which (already stated) the present appeal is.

The point, then, for decision being whether, as between the Association and the Respondent, it ought to be taken that the payment of 600*l.* by the Association to Mr. Le Sueur, on the 4th of February, 1852, was a good payment by way of loan at interest to the Respondent, so as to bind him in the same manner as if he had received the money in person from the Association by way of loan at interest, their Lordships are of opinion that it ought : thus agreeing, or in the main agreeing, with Mr. Justice Cloete, though differing, very respectfully differing, from Sir W. Hodges and Mr. Justice Bell.

Their Lordships think that the documents already mentioned, which, before the advance of the money, and on the occasion of making it, were produced to the Association by Mr. Le Sueur (whether considered as including, or as not including, the Exhibit marked D), were sufficient, as between the Association and the Respondent, to warrant the Association in believing, and acting on the belief, that Mr. Le Sueur had the Respondent's authority for receiving the 600*l.* on his account by way of loan to him, from the Association, at interest ; and their Lordships have come to the conclusion that, in so paying the 600*l.*, the person or persons representing the Association acted on that faith and in that belief.

It appears to have been contended in the Supreme Court, that each of the two alleged powers of attorney having been insufficient and ineffectual to authorize a mortgage or mortgage-bond, neither of them could be regarded as constituting, or adducible in evidence, alone or otherwise, for the purpose of proving, a mandate on the part of the Respondent, authorizing any person to receive any money by way of loan for him, without a valid mortgage or valid mortgage-bond. Their Lordships, however, are unable to accede to that argument. They are of opinion that the Respondent's chief and primary object in signing the documents which he did sign in January 1852, and in employing Rattray on the occasion, was to obtain a loan of money, with a view to

which only the Respondent desired or authorized a mortgage or mortgage-bond to be executed ; that the authority which he gave for borrowing money was not conditional upon obtaining it on a valid mortgage or mortgage-bond ; and that neither the invalidity of each of the alleged powers of attorney as a power for that purpose, nor the consequent invalidity of the mortgage or mortgage-bond (copied in page 10 of the Appendix), was inconsistent with the validity at least of the second power as a mandate to borrow money. Their Lordships think, with Mr. Justice Cloete, that it was, according to the law prevailing in the Colony, effectual as a mandate to borrow money : an impression upon their minds strengthened rather than weakened by the Exhibit A, and the Respondent's deposition already referred to. Taking substantially the same view of the meaning and effect, with respect to powers, of the two Ordinances printed in the Appendix, as Mr. Justice Cloete appears to have taken, their Lordships do not enter into the question of ratification by the conduct of the Respondent subsequent to Mr. Le Sueur's receipt of the money ; conduct on which alone, perhaps, the appeal might not improperly be decided, so far as it is now intended to decide it, against him. Nor do their Lordships mean to intimate any opinion whether a fraud was, or was not, committed on the Association as to the state of the title ; or if so, whether the Respondent is answerable for it. There is enough otherwise, they think, to render it right that the Judgment under appeal should be altered by substituting " 600*l.*" for " 170*l.* 9*s.* 9*d.*" They do not consider that there should be any other variation ; for, as they think, the claim for the 2*l.* 19*s.* 6*d.*, as for premiums (whether paid or not paid by the Association), failed, there having, in effect, been no mortgage ; and they are of opinion that the refusal of costs should be adhered to. They likewise consider that there should be no costs of the appeal. Their Lordships will humbly advise Her Majesty accordingly.
