

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Walker v. Jones, from New South Wales; delivered 16th February, 1866.*

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Present:

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an appeal from an order made by the full Court of Appeal of the Supreme Court of the Colony of New South Wales in its equitable jurisdiction, confirming an order of the Primary Judge in Equity of the said Court, whereby a motion on the part of the Appellant to dissolve an injunction which had been obtained against him by the Respondent *ex parte* was refused with costs.

In the month of November, 1861, the Respondent purchased a share in some extensive sheep and cattle stations, and the stock thereon, to which Ralph Meyer Robey was then entitled, and became a partner with Ralph Meyer Robey in carrying on the said stations and the business incident thereto. The terms of the purchase were that the Respondent should pay to Ralph Meyer Robey 8,148*l.* 13*s.* 4*d.* by four promissory notes, each for one-fourth of such amount at 6, 12, 18, and 24 months respectively, with interest added at 10 per cent. per annum, and that the payment of the notes should be secured by a mortgage of the Respondent's share of the partnership property, and that upon the notes being delivered and the security given, the Respondent should be entitled to one-third share or interest in the stations and stock. Some alterations were after-

wards agreed to be made in the amounts and times of payment of the notes, and ultimately the notes given by the Respondent to Ralph Meyer Robey in respect of the purchase, which were all dated the 17th October, 1861, and drawn by the Respondent in favour of Ralph Meyer Robey, were for

£2,139 0s. 6d. due 20th April, 1862.

£2,286 1s. 6d. due 20th January, 1863.

£2,444 12s. 6d. due 20th October, 1863.

£1,288 10s. 3d. due 20th April, 1864.

£1,347 1s. 8d. due 20th October, 1864.

By an indenture dated the 11th of February, 1862, and made between the said Ralph Meyer Robey of the one part, and the Appellant of the other part, after reciting that the Appellant had agreed to make advances to the said Ralph Meyer Robey by way of discount of the said promissory notes secured by a lien or mortgage upon a share of the said stations and stock, and that it had been agreed between the said parties that in addition to the endorsement of the said promissory notes and the transfer of the security for the same, the retirement thereof, and generally the payment of all monies which should at any time become due from the said Ralph Meyer Robey to the Appellant should be further collaterally secured by a mortgage of the land and hereditaments thereafter described, Ralph Meyer Robey conveyed to the Appellant by way of security for the said advances a parcel of land belonging to him, part of an estate called the Camperdown Estate. By another Indenture dated the 14th of April, 1862, and made between the Respondent of the one part and the said Ralph Meyer Robey of the other part, the Respondent assigned to the said Ralph Meyer Robey for his absolute benefit his the Respondent's one-third share of said stations and stock subject to a proviso, that if the Respondent should pay and retire the said promissory notes as and when the same should become due, the said Indenture should become null and void, but that if the Respondent should make default in payment of the said promissory notes or any of them on the days when the same should respectively become due, then and at any time after such default it should be lawful for the said Ralph Meyer Robey to take possession of the premises and hold the same as his absolute property, and whether such possession had

been taken or not, to sell and dispose of the same as he should think fit, and that the monies to arise from any such sale after payment of the expenses should be applied in payment of the said promissory notes or such of them as should remain unpaid, whether the same should be due or not, and the surplus, if any, should be paid to the Respondent. On the 20th of April, 1862, the first of the above mentioned notes became due. It does not appear whether it was paid or what was done with respect to it, nor is it material, the transactions with which we have to deal in this case having reference to the four other notes which at this time remained current. On the 24th of April, 1862, the said Ralph Meyer Robey, by an endorsement on the mortgage of the 14th of April, 1862, in consideration of value received by the discounting of the four promissory notes then current, and secured by the said mortgage, transferred the said mortgage to the Appellant to the intent that in pursuance of the legislative provision in that behalf the Appellant might, as such indorsee, have the same right, title, or interest as he the said Ralph Meyer Robey had or would otherwise have had therein; and by this indorsement the said Ralph Meyer Robey, in case it should at any time be found necessary or convenient to act in his name in the premises as the original or apparent mortgagee, constituted the Appellant his attorney for all purposes in relation to the said mortgage or the enforcement of the terms and conditions thereof.

On the 12th of September, 1862, it was agreed between the Respondent and the said Ralph Meyer Robey that the partnership between them should be dissolved, and that the Respondent should sell to the said Ralph Meyer Robey all his interest in the said stations and stock in consideration of the sum of 1,000*l.* to be paid to him by the said Ralph Meyer Robey, and of the said Ralph Meyer Robey delivering up all the said promissory notes cancelled. The partnership was accordingly dissolved, and Ralph Meyer Robey gave to the Respondent two promissory notes of 500*l.* each, but he did not deliver up the promissory notes which had been drawn by the Respondent, the Respondent being satisfied with his assurance that they were cancelled.

On the 24th of September, 1862, the Appellant by his attorney executed a deed-poll (which was also

endorsed on the mortgage of the 14th of April, 1862,) whereby, in consideration of 4,000*l.* to him paid by the said Ralph Meyer Robey, he assigned to the said Ralph Meyer Robey all his interest in the said mortgage and all and singular the stations and stock, and all other the premises comprised therein to hold to the said Ralph Meyer Robey discharged from the payment of the several promissory notes held by him the Appellant, and the monies thereby secured, and for his own absolute property subject to any equity of redemption subsisting therein, if any, on the part of the Respondent, but without prejudice to any other remedy or security of the Appellant on any of the said promissory notes remaining in his hands unretired and unsatisfied. Some time after the promissory note which was due on the 20th October, 1863, had become due, the Appellant commenced an action in the said Court in its Common Law jurisdiction against the Respondent upon that note, and thereupon and on the 27th May, 1864, the Respondent filed the bill in the cause out of which this appeal has arisen against the Appellant and the said Ralph Meyer Robey, who was out of the jurisdiction of the Court, stating the facts above mentioned, and further to the effect that the Respondent had no notice of the dealings between the Appellant and the said Ralph Meyer Robey, and that the Appellant had notice of the dealings between the said Ralph Meyer Robey and him the Respondent, and that the Appellant could by sale or realization of the stations and stock assigned to him, have obtained a sum of money sufficient to have paid off all the said notes, and that the value of the property re-assigned to the said Ralph Meyer Robey was sufficient to pay a larger sum than the total sum for which the said notes were given, and praying that the promissory notes in the hands of the Appellant might be delivered up to be cancelled, and that the Appellant might be restrained from proceeding in the action commenced by him, and from prosecuting any further action on any of the said notes, and that if necessary an account might be taken of what was due on the notes, and that on taking such account the Respondent might be credited with the 4,000*l.*, and with the difference between the actual value of the mortgaged property

re-assigned by the Appellant to the said Ralph Meyer Robey and the said sum of 4,000*l.*; and that if upon taking such account any sum should be found due from the Respondent, he might be reimbursed out of the securities given by the said Ralph Meyer Robey to the Appellant by the Deed of the 11th February, 1862. Upon the filing of this bill an *ex parte* Injunction was granted by the Primary Judge of the Court to restrain the Appellant from proceeding in the said action, and from prosecuting any further action on any of the said notes. A motion was afterwards made on the part of the Appellant before the Primary Judge to dissolve the Injunction, but, on the 21st June, 1863, the Primary Judge refused this motion with costs. Upon these motions evidence was adduced on the part of the Respondent for the purpose of fixing the Appellant with notice of his the Respondent's dealings with the said Ralph Meyer Robey, but the evidence was not sufficient to fix the Appellant with such notice.

The Appellant appealed from the order of the Primary Judge dismissing the motion to dissolve the Injunction to the full Court of Appeal, but that Court, by an order bearing date the 6th August, 1864, dismissed the Appeal with costs. It is from this last-mentioned order the Appeal which we have now to dispose of has been brought.

In disposing of this Appeal, we think it right, in the first place, to observe that questions possibly of some nicety and difficulty as to the rights and obligations of mortgagees, in their dealings with the mortgaged property, appear to be involved in this cause, and that the stage of the cause in which this Appeal has been brought renders it difficult for us now to deal with those questions. They are questions more proper to be determined at the hearing of the cause, and it is not necessary, nor, indeed would it be right, for us now to give any final opinion upon them; but yet the consideration of them is necessarily to some extent at least involved in the question which alone we have to consider, whether the order under Appeal ought or ought not to have been made. The real point before us upon this Appeal is not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions is such that it was proper that the Injunction should be granted

until the time for deciding them should arrive. The material points, and those with which only we think it necessary to deal, appear to us to be these : What were the relations subsisting between the Appellant and the Respondent? What were the rights and obligations flowing from those relations? and whether the course of conduct pursued by the Appellant has been in conformity with, or in opposition to, those rights and obligations, considering, as we repeat, these several questions with reference only to their bearing upon the order under Appeal and not for the purpose of finally deciding them. As to the first of these questions, we think that no doubt can reasonably be entertained. We take it to be clear that the endorsement of the 24th of April, on the mortgage of the 14th April, 1862, placed the Appellant in the position of a mortgagee of the property comprised in that mortgage, and that thenceforth the relation of mortgagee and mortgagor subsisted between the Appellant and the Respondent. The Assignee of a mortgage cannot, in our opinion, stand in any different character, or hold any different position from that of the mortgagee himself, although as in this case, the mortgagor may not have been a party to the assignment; then, secondly, what were the rights and obligations flowing from this relation between the Appellant and the Respondent, and we think that this point is open to no greater difficulty. It is also clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt.

Has, then, the course of conduct pursued by the Appellant been in conformity with, or in opposition to, these rights and obligations? Now, what the Appellant has done is this: he has, by the endorsement of the 24th September, 1862, transferred the property comprised in the mortgage to Ralph Meyer Robey, retaining to himself the debt secured by the mortgage. He has not, as he might have done, sold the property comprised in the security, but he has, in

effect, sold the security itself, which he certainly was not authorised by the mortgage deed to do. Now, it is not necessary for us to say that in no case can the mortgage debt be severed from the security for that debt; nor is it even necessary for us to say that, in this particular case, the debt and the security could not be so severed. It is sufficient, if there be a question upon the point proper to be determined upon the hearing of the cause, and on looking to the cases of *Palmer v. Hendrie* (27 Bevan, and *Thornton v. Court*, 3 D. M. and G.), we have no difficulty in arriving at this latter conclusion.

It was said for the Appellant that *Palmer v. Hendrie* was the case of principal and surety, but what was said upon the point under consideration did not proceed upon that ground, and the case of *Thornton v. Court* in no way involved any question of suretyship. These cases, therefore, from which we see no reason for dissenting, seem to us to be of themselves sufficient to show that upon this point alone, there was a question of no little importance to be decided at the hearing of the cause; and, therefore, to have furnished sufficient ground for the granting of this Injunction. But this case does not rest here, for upon the transfer of the security to Ralph Meyer Robey, by the endorsement of the 24th September, 1862, the Appellant received from him the sum of 4,000*l.*, which, after paying the bill due on the 20th January, 1863, would go far to meet the bill which became due on the 20th October, 1863, and on which the Appellant has brought his action; and it cannot we think, be otherwise than a very serious question to be decided at the hearing of the cause, how this sum of 4,000*l.* ought to be dealt with in account between the Appellant and the Respondent; there was here, therefore, further ground for granting this Injunction. It was urged for the Appellant that the position of the Respondent was in no way altered; that had Ralph Meyer Robey retained the security when he discounted the bills, the Appellant must have paid the bills, and then sued Ralph Meyer Robey for the re-conveyance of the mortgaged property, and that he could do so now, the transfer to Ralph Meyer Robey having been made subject to the Respondent's equity of redemption, if any; and, further, it was urged for the Appellant, that the

Respondent had nothing to with the transaction between the Appellant and Ralph Meyer Robey, but we are by no means satisfied that it may not well be held to be a sufficient answer to these arguments that they lay out of consideration the Appellant's position and duties as mortgagee, and proceed more upon a view of the case as it might have stood, than as it actually stands. It was further argued, on the part of the Appellant, that in any event, the order under Appeal ought not to have been made except upon the terms of the money being paid into Court, but the receipt by the Appellant of the 4,000*l.* goes far to answer this objection, and we see no sufficient reason for interfering with the discretion exercised by the Court in this respect. Upon the whole, therefore, we are of opinion that this Appeal cannot be supported, and we shall humbly recommend Her Majesty to order that it be dismissed, and dismissed with costs.

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