

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dioré v. Lachambre, Gautreau, and Co., from the Supreme Court of Mauritius, delivered 7th July, 1877.

Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal against a Judgment of the Supreme Court of Mauritius, confirming two Judgments of the Master of the Court, whereby he over-ruled certain objections to a provisional scheme of distribution of the sale-price of an estate, called the "Estate Phœnix."

The facts necessary to the understanding of the Judgment about to be given are as follows:—

On February 29, 1872, Made. Dioré (the Appellant) agreed by a notarial deed to advance to M. Gustave Pougnet, the owner of the Estate Phœnix, a sum of 42,000 dollars, "Pour servir aux besoins et affaires de sa propriété . . . et être employées au retrait des billets souscrits par M. Pougnet pour compte de la dite propriété."

The sum was to be advanced in instalments as the bills became due, and was to be repaid in three equal parts in September, October and November, 1873, respectively; and M. Pougnet further agreed in the meantime on demand to give bills to be endorsed by his brother, to be replaced at maturity by similar bills, the maturity of the last renewal of the bills not being later than the date of the falling due of the last of the repayments. Pougnet granted as security a mortgage over three portions

of land forming part of the "Estate Phoenix," viz., "St. Marie," Terrain Bigara, and Terrain Letellier, and his rights under a lease by Made. Malherbe.

In pursuance of this agreement the advance was made by Made. Dioré, and the bills were given by M. Pougnet.

On December 31, 1872, Made. Dioré, by another notarial deed, in consideration of the extension of her mortgage over the whole of the Estate Phoenix, of a first mortgage over certain other lands of "Cacqueray" and "Chaillet," and an inscription on certain lands at "Vacoas," conceded priority to a mortgage in favour of the "Crédit Foncier" over that held by her upon "St. Marie" and "Terrain Bigara," ceded all rights she had in "Terrain Malherbe," and agreed "à céder jusqu'à concurrence d'une somme de 80,000 piastres priorité et préférence à toutes personnes qui feraient des avances à M. Gustave Pougnet pour les besoins et affaires d'habitation 'Phoenix' pendant la coupe de 1873 à 1874," on the express condition that all sugars of the crop of 1873-4 should be consigned for sale to the parties making the advances for the purpose of meeting these advances.

In the previous November, a mortgage had been given by Pougnet of the Estate Phoenix to the Crédit Foncier for 125,000 dollars, who *quoad* 25,000 dollars stood in the place of a former mortgagee, so that, on the execution of this deed, Made. Dioré became the second mortgagee of the whole of the Phoenix property, and the first mortgagee of some other properties with respect to which no question arises in this suit.

It would appear that Pougnet had been in the habit of working his estate, in a great measure, on a system of credit, and had, before the year 1872, borrowed money to a considerable extent, of the firm of Thomas Lachambre and Co., who were bankers in Paris, having a branch in the Mauritius, and had secured those advances by mortgages. Thomas Lachambre and Co. cancelled those mortgages, except as far as they related to the "Terrain Letellier," by a notarial instrument of the 30th December, 1872. After this the firm was dissolved, and put in process of liquidation, and was succeeded by the new firm of Lachambre, Gautreau, and Co., the Defendants in the present suit.

To them Pougnet applied for advances for the requirements and business of his estate, so that he might be able to realize the crop of 1873-74. That crop was calculated as likely to produce 2,700,000 lbs. of sugar, and if it had, Pougnet would probably have improved his position and the value of his property. His mortgagees, therefore, as well as himself, were interested in his obtaining the requisite advances.

In this state of circumstances the deed was executed, upon the construction of which this case mainly rests.

It is a notarial deed dated the 21st February, 1873, between M. Deymié, as agent for the Respondents of the one part, and M. Pougnet of the other part, and it commences in these terms :—

“ M. Deymié ès qualité déclare par ces présentes ouvrir à M. Gustave Pougnet un crédit de la somme de 80,000 piastres pour servir aux besoins et affaires de la propriété “ Phœnix ” ci-après désignée et réaliser la coupe de la propriété pendant l’année 1873 à 1874.

“ Le montant de ce crédit sera versé par MM. E. Lachambre, Gautreau, et Cie. par portions mensuelles au fur et à mesure des besoins de M. Pougnet et ainsi qu’il sera convenu entre parties et les paiements à faire en vertu des présentes auront lieu, savoir :—

“ Pour ce qui concerne les fournitures nécessaires au bien “ Phœnix ” sur les comptes des divers fournisseurs mandatés par M. Pougnet sur MM. Lachambre, Gautreau et Cie., qui auront à les payer.

“ Et pour ce qui concerne les gages des laboureurs et autres employés du dit bien sur les états fournis par l’administrateur et visés par M. Pougnet, néanmoins MM. E. Lachambre, Gautreau, et Cie. se réservent le droit de payer eux-mêmes ces gages s’ils le jugent à propos de se faire subroger dans les droits des employés et laboureurs.

“ Quant aux sommes à payer pour capitaux et intérêts aux créanciers, elles seront payées sur les reçus des divers créanciers, mais M. Deymié ès qualité, se réserve le droit de faire ces paiements avec subrogation au profit de MM. E. Lachambre, Gautreau, et Cie.

“ Etant bien convenu que toute entrée faite dans le compte courant dont il sera parlé ci-après touchant les paiements faits par subrogation ne pourra en aucun cas être considéré ou interprété comme une dérogation à la présente clause et comme constituant une novation aux droits résultant en faveur de MM. E. Lachambre, Gautreau, et Cie. des paiements faits avec subrogation à leur profit.”

Provisions follow as to the times and modes of payment and the receipts to be given, and a power is reserved to the Respondents to state their advances

and demand repayment of the sum already advanced, if (among other things) any judicial proceeding be brought against Pougnet for any debt personal or relating to the property "Phœnix," or if it be proved that the crop will be insufficient to reimburse the Respondents.

All sugars made on the estate are to be consigned to the Respondents.

At the end of the deed are the following clauses :—

Aux présentes est intervenue Made. Fanélie de la Roche Souvestre, veuve en premières nocés de M. Joseph Humbert et en secondes nocés de M. Pierre Dioré, propriétaire demeurant au Port Louis.

Laquelle, après avoir pris communication de ce qui précède, et en exécution de la promesse par elle faite, déclare par ces présentes céder aux dits Srs. E. Lachambre, Gautreau, et Cie., toute priorité et préférence sur le montant de sa créance pour toute balance que pourra leur rester devoir M. Pougnet en capital, intérêts, et accessoires par suite des avances ci-dessus, mais en tant seulement que la dite créance repose sur la propriété "Phœnix," le rang de sa créance étant expressément réservé sur les terrains Chaillet, Cacqueray, aux Vacoas, et Letellier.

"Voulant qu'à tous ordres, ayant pour objet le prix de la dite propriété, MM. E. Lachambre, Gautreau, et Cie. soient colloqués par préférence à elle."

The Respondents put an end to the credit on November 26, 1873, in pursuance of the power reserved to them, and seized the estate for non-payment of a balance of advances (as they alleged) of more than 100,000 dollars.

As the case of the Appellant has not been rested on any wrongful exercise of this power, it is enough to say that the event mentioned in the condition occurred of a creditor taking legal proceedings, and that there is some evidence of the occurrence of the event named in the other condition, viz., a probable deficiency of the crop. Upon this the proceedings required by the law of the island (about the regularity of which there is no question) were taken; the property was put up for sale, and was bought by the Respondents for 166,000 dollars, and an *ordre* issued for the distribution of the sale price. In the provisional scheme of distribution drawn up by the Master, the Crédit Foncier and other parties holding claims admittedly prior in rank to Madame Dioré and the Respondents were col-

located for various sums, and the Respondents for the remaining sum of 21,800 dol. 76 c., in part payment of their advances. Objections were taken before the Master, on behalf of the Appellant, to the collocation of the Respondents as regards this sum in priority to her own claim under her mortgage, which objections were overruled by the Master, and the Judgment of the Master was affirmed, on appeal, by the Supreme Court; this latter Judgment is that now under appeal.

In the argument before their Lordships one objection only to the Judgment of the Master was insisted on, viz., that a large portion of the advances were not of that description to which Made. Dioré had agreed to cede priority; and that if this portion were deducted, the remaining advances were more than covered by the proceeds of the sugar which the Respondents had received.

The Respondents, in the first instance, laid an account before the Master, claiming a balance of advances exceeding 100,000 dollars.

The Master, in his Judgment of March 8, 1875, thus expresses himself:—

“By my judgment of the 3rd December last, I have decided that such advances and payments only as have been made by E. Lachambre, Gautreau, and Co., for the wants and requirements of the estate Phœnix, and the realization of the crop of 1873 and 1874, since the opening of credit of the 21st February, 1873, and not exceeding the sum of 80,000 dollars, which is the amount of the credit, are protected by the mortgage granted to them on the said estate, and not all the other advances and payments that may have been made for other purposes, or previous to the opening of credit, and beyond the said sum of 80,000 dollars, at least with regard to Widow Dioré; and I have ordered that they should file in my office a fresh account, restricted to the sole advances and payments so made by them as aforesaid not exceeding 80,000 dollars, and expunging therefrom all sums paid before the 21st February, 1873.

“This has been done, and one account rectified according to my order has been put in, showing on behalf of the said E. Lachambre, Gautreau, and Co. a balance of 36,317 dol. 23 c.

“Setting aside the first account, this new account is the one upon which we shall go. It starts from the 3rd March, 1873, and contains on the debit side up to the 29th August following twenty-six items of advances and payments all supported by vouchers, signed by Gustave Pougnet as “faisant partie du crédit ouvert,” and amounting together to 80,323 dols. 45 c., that is, 323 dols. 45 c. over and above the amount of the credit.

“We have not, therefore, to deal with all the sums alleged to have been paid prior to the 21st February, 1873, and posterior

to the 29th August following, which were borne in the first account, and in my opinion are out of the credit.

“The question now to be examined is whether that sum of 80,323 dols. 45 c. has been applied to the wants and requirements of the estate Phœnix, and the realization of the crop of 1873 to 1874 ‘pour servir aux besoins et affaires de la propriété Phœnix, et réaliser la coupe de la dite propriété pendant l’année 1873 à 1874,’ as stipulated in the deed of the 21st February, 1873.”

It has been contended on behalf of the Appellant not that the Master has herein wrongly stated the principle to be adopted, but that he has misapplied his principle. The case of Made. Dioré is that the advances to which she ceded priority were only advances for the purpose of obtaining materials, labour, and other things necessary for the getting in of the growing crop, and not advances for the purpose of paying old debts of M. Pougnet, unless they were due to privileged or secured creditors only. The Judgment of the Master, confirmed by that of the Court, is, in substance, that these advances were not so restricted, but extended to the general requirements of the estate pending the duration of the credit, and to the payments of such debts, in respect of the estate, as would fall to be paid during the year the crop to be realized was maturing, viz., 1873-74, and which, if not paid, would probably have led to its seizure and sale.

In the deed of December, 1872, the cession of the rights of the Plaintiff in favour of any creditor who might advance 80,000 dollars, is not restricted in terms as it might have been, to advances for the current expenses of cultivating and manufacturing the crop, but applies to advances “pour les besoins et affaires d’habitation Phœnix pendant la coupe. . . .” words to which the Judges of the Court below, who must be thoroughly conversant with the manner in which sugar estates are managed in the island, attach a wider signification, and which (it may be observed) had been applied in the previous deed of February 29, 1872, to advances for meeting bills drawn in respect of past debts. The deed of February 21, 1873, to which Made. Dioré by intervention became a party, and by the provisions of which she is bound, contains the same expression slightly varied, “pour servir aux besoins et affaires de la propriété Phœnix, et réaliser la coupe. . . .”

That deed provides for the payments being made monthly, according to the needs of M. Pougnet, for the necessary supplies and the wages of labourers, and it further provides, in a separate clause, for the payment of capital and interest to "creditors."

It has been argued that, because a power of subrogation is given to the Respondents, this clause should be read as if the words "privileged or secured" had been inserted before the words "creditors." It, however, by no means follows that because, under the general word "creditors," there may be included some privileged creditors, in whose place it might be desirable for the Respondents to put themselves; therefore, the general term is to be restricted so as to comprise only this class. Such a construction appears to their Lordships a forced and constrained one, and they agree with the Court in rejecting it.

Having reference to this clause of the deed, coupled with all its provisions bearing on this subject, together with the surrounding circumstances, their Lordships are of opinion that the proper construction was put upon it by the Court. An attempt was made on the part of the Appellant in the Court of Mauritius, as well as before their Lordships, to distinguish in principle a debt of 20,319 dollars, paid to the liquidators of the defunct firm of Thomas Lachambre and Co., from debts due to other creditors; but, in their Lordships' opinion, this attempt has not been successful. The debt was incurred in respect of advances for the purposes of the estate; it was witnessed by a notarial deed, and, although the mortgage by which it was secured on Phoenix had been withdrawn, apparently with a view to the arrangement with the Crédit Foncier, it remained a debt with a "titre authentique," which the liquidators of the late firm had the power, and were perhaps charged with the duty of enforcing against the estate.

Their Lordships having expressed their concurrence with the Court in the construction of the language of the deed of February 29, 1873, have only to add that, adopting that construction, they are satisfied, as a matter of fact, that the balance due to the Defendants in respect of their advances under the deed was sufficient to justify the appropriation made by the Master, and that there remained

no part of the purchase-money of the estate applicable to the mortgage of the Appellant. For these reasons they will humbly advise Her Majesty to affirm the Judgment appealed against, and to dismiss the appeal with costs.
