Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of New South Wales, Defendants and Appellants, v. *O'Connor, Plaintiff and Respondent, from the Supreme Court of the Colony of Victoria; delivered 9th March* 1889.

Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR WILLIAM GROVE.

[*Delivered by Lord Macnaghten.*]

The question involved in this appeal is one of some importance to persons who may be concerned in lending or borrowing money on mortgage in Victoria.

There are no facts in dispute.

O'Connor, the Plaintiff in the action, was a coach builder in Beechworth, a comparatively small town in daily communication by rail with Melbourne, and distant, apparently, some few hours' journey from that city. He was in a fair way of business. His profits, he says, averaged from 400*l.* to 500*l.* a year, and his business seems to have been increasing down to the end of 1886.

O'Connor kept an account with the Beechworth branch of the Bank of New South Wales from October 1884. In the course of the

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next two years he somewhat crippled his resources by contesting a seat in the Legislative Assembly, and by incurring some expense in furnishing a house on the occasion of his marriage. He borrowed from his mother, Mrs. Pye, who lived in Melbourne, two sums of 150*l.* and 200*l.*, without security, both of which he paid back with interest. He also incurred a debt of 100*l.* to the Bank. To secure that sum he deposited the title deeds of a small plot of ground where he carried on his business. The land is said to have been worth 200*l.*, and the buildings on it, which were of wood, and about eight years old, some 400*l.* more. He acquired the property from his uncle by a voluntary conveyance in January 1886. He mortgaged it to the Bank by a deed dated the 22nd of February 1886, which was duly registered. The mortgage was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt with interest, and the surplus was to be paid to the debtor as personal estate. The deed had a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the Bank was entitled to in respect of the deposit of the title deeds relating to the property.

On the 24th of January 1887 O'Connor's working account with the Bank was in credit to the amount of 1*l.* 4*s.* 9*d.* On the following day it was overdrawn, and it was never again in credit. On the 4th of February Hannaford, the Manager of the Bank at Beechworth, wrote to O'Connor, stating that his account was 61*l.* overdrawn, and requiring him to pay in 125*l.* to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage of February

1886, O'Connor had a discount account with the Bank. It comprised two classes of bills discounted for him by the Bank, (1) bills of which he was endorsee, and (2) acceptances of his discounted at his request for the convenience of other persons. In reply to Hannaford's letter O'Connor called at the Bank, and said that he could not pay in 125*l.* straight off at such short notice. He seems to have satisfied Hannaford that the bills referred to in his letter were or would be provided for.

On Monday the 14th of February Hannaford wrote again to O'Connor, stating that his working account was 67*l.* overdrawn, that it was the balance day of the week, and that O'Connor must get the account largely reduced before 3 o'clock. He added that he hoped that O'Connor did not give out any wages cheques on Saturday. O'Connor went immediately to the Bank, and assumed a somewhat indignant tone, apparently on the ground that he had been in the habit of having an overdrawn account. It was a strange way of doing banking business, he said, to send him a letter on Monday, knowing his wages cheques were all paid on Saturday. However, he got Hannaford to promise to honour some small cheques of his which were outstanding, and then he said, "One thing, you "won't trouble me much longer with letters of "this kind. I'll go to Melbourne some time this "week, and get enough money to carry on "independent of the Bank."

On Friday the 18th of February O'Connor called at the Bank, and said he was going to Melbourne to get the money to carry on his business. Thereupon, at his request, Hannaford consented to pay a bill for 12*l.* 15*s.* which would fall due on the next day. O'Connor promised to be back about Wednesday, the 23rd.

O'Connor went to Melbourne and saw his mother. She promised to lend him 600*l.* She said at the trial he might have had 1,000*l.* She advanced him 300*l.* in cash, on the terms that the money was to be used for lifting his deeds at the bank, and for no other purpose. He was to take his sister with him to the Bank and hand over the deeds to her. The deeds were to be brought back or the money restored at once.

O'Connor returned to Beechworth on Saturday night. The wages of his men, which were due at 1 p.m. on that day, were unpaid. When he returned home, he had only 6*l.* or 8*l.* of his own, and he owed about 20*l.* for wages. The men reassembled for work on Monday, the 21st. He told them he would pay them at dinner time, but he failed to do so, and some of the men struck work then and there.

On the same day, Monday, the 21st—but whether before or after this occurrence is not stated—O'Connor went to the Bank with his sister, taking with him his mother's money in a bag. Hannaford had made out O'Connor's account up to the 23rd of February, showing a balance of 371*l.* 3*s.* 4*d.* in respect of indebtedness and liability. The items shortly were as follows:—

	£	*s.*	*d.*
Secured account - - -	103	12	0
Working account - -	81	14	5
Discount account:—			
As endorsee - - -	106	7	6
As acceptor - - -	79	9	5
	£371	3	4

O'Connor objected to the last item of 79*l.* 9*s.* 5*d.*, saying it was "monstrous," as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them

over unless the whole amount of debt and liability were cleared off, saying he had to obey instructions. O'Connor observed that he had to return the money or take back the deeds at once. Hannaford then said that he would send the deeds and bills to the head office in Melbourne. O'Connor, after consideration, said that he would take the money to Melbourne, and he asked for and obtained a copy of the document on which the bank relied. It does not appear that O'Connor told Hannaford, at that interview, how he was situated with his workmen or that he asked for any further indulgence from the Bank.

Instead of taking the money to Melbourne at once, O'Connor wrote a letter to his mother which she seems to have mislaid. On Tuesday, the 22nd, she sent a reply in the handwriting of her son, a boy of about eight or nine years old, which said, "Ma went to the Bank and "found that the money did not come down. "Ma is annoyed about it, as she expected the "money to be there to-day. Ma said she does "not want no humbugging with you." On receipt of this letter, O'Connor went to Hannaford and said his mother had written to him an angry letter, and that he should now be unable to get money from her. On Thursday O'Connor took the money back to his mother.

On Saturday, the 26th of February, Hannaford wrote to O'Connor, saying that he had had a communication from the head office, and that the Bank would not insist on payment of the 79*l.* 9*s.* 5*d.*, less rebate, though they were entitled to do so.

On the 28th of February the writ in this action was issued.

On the 8th of March the Bank waived their claim to a general lien.

Under these circumstances, if O'Connor had brought an action for redemption on the day on

which the writ was issued, he might possibly have been entitled to costs up to the 8th of March. On the other hand, if he had persisted in the action after the Bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the Court, have had to pay the costs of the action.

A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. In Cotterell *v.* Stratton, 8, Chancery Appeals, 295, Lord Selborne observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions, and he goes on to point out that such a departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions. In the present case it is not easy to understand how the Bank, or their Manager, can be charged with vexatious or unreasonable conduct. It is admitted that Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the Bank were careful to take a formal security

for 100*l*., it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so bold and defiant a tone in his communicaions with Hannaford, if it had not been taken for granted on both sides that the Bank had some security in their hands. Hannaford was merely a subordinate, acting under instructions, as O'Connor knew. O'Connor had given no notice that he intended to draw a line at a certain point in the account. There was no opportunity of consulting the head office. Hannaford, therefore, seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the affair was not completed in Melbourne was not the fault of the Bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money to her at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition,—" My mother would not " lend me the money again. She was angry with " me."

The action, however, which O'Connor brought against the Bank was not an action for redemption. It was an action of detinue. The writ was issued in haste. But the statement of claim was not delivered until the 14th of April. It is certainly a singular document. It does not refer to the mortgage of February 1886, or notice the fact that the deeds were deposited as a security. It simply states that the Bank on 21st February 1887 detained, and had always since such time detained, from the Plaintiff his title deeds. It specifies the

deeds, and states that by reason of such detention the Plaintiff had suffered damage as follows,— "He was rendered unable to procure a loan of "600*l.* from Annie Pye, . . . and unable to pay "his workmen in his business of coach builder, "and was compelled to discharge some of his said "workmen, and was rendered unable to meet his "liabilities in his said business, and was sued in "respect thereof, and his credit was injured and "his trade diminished, and his said business was "otherwise injured." Then it claims a return of the deeds, or 1,000*l.* for their value, and 2,000*l.* for their detention.

The defence was delivered on the 29th of April. It is equally remarkable. For some unexplained reason, the Bank also abstained from referring to the mortgage of February 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the Plaintiff deposited the said deeds with them to secure the repayment of 100*l.*, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability, they brought into Court 50*l.* and one shilling, and they delivered a counter claim for money due to them.

In reply, the Plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still remained due. He then stated the tender on the 21st of February, and its refusal.

Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the Bank allowed the action to be set down for trial. It came on to be tried on the 20th of July 1887, before Mr. Justice Holroyd and a jury. In addition to proof of the facts already stated, evidence of a somewhat loose and unsatisfactory description

was offered, with the view of proving the special damages alleged in the statement of claim. This evidence was objected to, on the ground that the damages claimed were too remote. The learned Judge admitted the evidence, but reserved the question of its admissibility for the consideration of the Full Court. No evidence was given on the part of the defence. The jury estimated the value of the property at 700*l*. They gave 1,500*l*. damages for detention, and they found that there was due to the Bank under the counter claim the sum of 284*l*. 2*s*. 7*d*., which was afterwards reduced by consent to 202*l*. 1*s*.

The question reserved came on to be argued before the Full Court on the 10th of August 1887, when it was held that the evidence objected to was admissible.

On the 26th of August 1887, on motion for judgement, the Court adjudged,—

1. That the Plaintiff recover against the Defendant 1,500*l*. on his claim.
2. That the Defendant recover against the Plaintiff the sum of 202*l*. 1*s*. on the counter claim.

Provision was made for set off and payment of the balance, and the Bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the Plaintiff. The Bank was ordered to pay the costs of the action and the costs of the argument before the Full Court, after deducting the costs of the counter claim.

On the 2nd of November 1887 the Bank moved the Full Court for an order to set aside the verdict for the Plaintiff, on the grounds that it was against the weight of evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The Court ordered that the verdict should be

affirmed, and that the motion for a new trial should be dismissed, with costs.

The Bank has appealed to Her Majesty in Council from the two orders of the Full Court and the judgement of the 26th of August 1887.

The whole matter is therefore open with this exception, that the Bank cannot now be permitted to rely upon the legal mortgage of the 22nd of February 1886, although it was put in evidence at the trial by the Plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit, and the appeal must be decided on that footing.

The learned Counsel for the Appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which mortgagees would be exposed if such a verdict were upheld. They contended too that no damages, or at any rate no substantial damages, were due either in fact or in law These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But in their Lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the Court below was apparently not called to it. The Appellants are to blame as well as the Respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action both parties have chosen to ignore them.

The question that suggests itself is, can such an action as this be maintained? It was treated by the learned Counsel for the Respondent, and indeed by the learned Counsel for the Appellants during a great part of their argument, as an

action for damages occasioned by a wrongful act arising out of breach of contract. What is the wrongful act? And what is the breach of contract? Their Lordships have not had the advantage of seeing a note of the summing up. But in the Full Court the learned Judge who tried the case states his view as follows:—"In "my opinion there was a contract here to de- "liver up the deeds on payment of a certain "sum of money. That was broken when the "money was tendered and ought to have "been accepted Then the Bank was in the "same position as if it had actually taken "the money and then refused to deliver up "the deeds. That was a wrongful detention of "another man's property, and therefore a tort." The Bank was no doubt bound to deliver up the deeds on payment of the sum secured, with interest and costs if any. But, in their Lordships' opinion, there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrong doer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem, must do equity and pay principal, interest, and costs before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either

writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a Court of Equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court if there be any conflict the rules of equity must prevail. In Postlethwaite *v.* Blythe, 2 Sw., 256, where property had been conveyed to secure a debt of a comparatively small amount, the Lord Chancellor refused to direct a release upon payment into Court of the largest sum to which the debt would in probability amount. Lord Eldon said, "I take it to be contrary to the whole "course of proceeding in this Court to compel "a creditor to part with his security till he has "received his money. Nothing but consent can "authorize me to take the estate from the "Plaintiff before payment." To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title deeds. It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper

tender he can always obtain his deeds on a summary application on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. A form of order adapted to such a case is to be found in Seton on Decrees, 3rd Ed., p. 1040.

No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A Court of Equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects a tender he rejects it at his own risk, and in an action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further, a proper tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee; Gyles *v.* Hall, 2 P. W., 377. But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie.

The learned Counsel for the Respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In Chilton *v.* Carrington, 15 C. B., 95 and 730, 16 C. B., 206, the experiment was tried once and again. But the result of two actions in that case, so far as they are reported, affords but little encouragment for a repetition of the experiment.

In Chilton *v.* Carrington the assignee of a bankrupt publican sought to recover the title deeds of a public-house which had been deposited with the Defendants to secure a sum of 150*l.* The action was brought after tender. The

Plaintiff sued for detention of the deeds, which were described in the declaration as "goods and chattels," and for damages. The Defendants did not put in an equitable plea, but their case was that the deposit was intended to secure an account for beer as well as the 150*l*. That question was tried on demurrer. It was held that the deposit was only a security for the 150*l*. The parties then went to trial, and there being no equitable defence, they agreed that the jury should find the damages for the detention, and that they should not be required to assess the value of the so-called goods and chattels. Upon this arrangement the jury found a verdict for 60*l*. damages. The Plaintiff then applied to the Judge in chambers for delivery up of the deeds. The Defendants urged that they ought not to be required to deliver up the deeds before payment. The learned Judge, however, made the order. The Defendants then applied to the Full Court to set aside the order, and argued that, according to the settled principles of equity, they could not be required to part with their security until they were paid. The learned Judges were puzzled by the course which the parties had taken. In the course of the argument, addressing the Counsel for the Defendants, Mr. Justice Williams observed with perfect accuracy, "If you are right the "Plaintiff ought not to have succeeded in "the action." Ultimately the Court got over the difficulty, by setting aside the order in chambers, on the ground that by arrangement between the parties the jury had been discharged from finding the value of the deeds detained. As the result of that action the Plaintiff was no nearer getting back his deeds. However, he still contended that, having made a proper tender and that tender having been refused, he was entitled to have his deeds without payment of the money. So he brought another action of

detinue. On this occasion the Defendants were better advised, and they put in a plea by way of equitable defence that the deeds were deposited to secure 150*l*., and that that sum remained unpaid. On argument the Court allowed the plea to be put in, and nothing further seems to have been heard of the action.

That case, so far from being an authority in favour of the Respondent is really an authority against him.

Their Lordships are therefore of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances, their Lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their Lordships, cannot arise.

The proper order will be to dismiss the action to allow the verdict on the counter claim as reduced by consent to stand, and to direct payment to the Appellants of the reduced amount, together with interest and the costs of the counter claim.

As to the costs of the action, having regard to the way in which the Bank has acted in the conduct of the litigation, their Lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal.

Their Lordships will humbly advise Her Majesty accordingly.