Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barton v. *the Bank of New South Wales, from the Supreme Court of New South Wales; delivered* 15*th July* 1890.

Present:

LORD WATSON.
LORD HERSCHELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

WILLIAM BARTON, who died in 1881, obtained in the year 1869 a cash credit from the Respondent Bank for 600*l.*, for which he granted a personal bond in the usual terms, and at the same time deposited with the Bank the title deeds of three parcels of Crown land, the property which is now in dispute. On the 20th of July 1874, the principal and interest due upon the cash account amounted to 723*l.* 12*s.* 10*d.*, and upon that date the debtor executed an absolute conveyance of the land in question in favour of the Bank. The indenture is not a bare conveyance of the legal estate, but embodies the terms of a transaction in pursuance of which the conveyance was made. It narrates that "it has been agreed between "the parties hereto that the said William Barton "shall convey to the said Bank of New South "Wales the three parcels of land herein-after "described in manner herein-after expressed, "and that the said debt shall be reduced by the "sum of four hundred pounds," and it is on the express consideration of that agreeement having been entered into that Barton proceeds to sell and release and convey to the Bank, their successors

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and assigns at all times thereafter, the fee of the land, with the usual covenants for title and further assurance.

Now the meaning and effect of that deed, when taken by itself, do not admit of doubt. The Bank became the absolute owners of those three parcels of land, and the price which they undertook to pay for them was to be made good to the grantor of the deed by deducting 400*l.* from the sum of 723*l.* odd, which was then due by him. That converted the land of which the Bank were in a position to demand a conveyance in security, by virtue of their equitable right, into their absolute property, and left Mr. Barton a personal debtor for the balance of the debt over and above 400*l.*

The case which the Appellant makes is that the parties, notwithstanding the plain terms of the indenture, intended to stand and did continue to stand towards each other in the relation of mortgagor and mortgagee, and that they remained in exactly the same position as they would respectively have occupied had an ordinary deed of mortgage been granted instead of the conveyance of the 20th July.

Now undoubtedly the terms of the conveyance may be qualified by collateral evidence, but in order to set aside the arrangement which the parties have assented to by executing and receiving the deed, very cogent evidence is required in a case like the present. Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed, but where in the deed itself the reasons for making it, and the considerations for which it is granted are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution.

In the course of the argument some ingenious suggestions were made as to the reasons which might possibly induce the Bank to take for their security an absolute conveyance instead of an ordinary mortgage, but it is difficult to conceive the reason why the parties having the intention to stand in the same relation to each other as if the deed had been an ordinary mortgage, should take the trouble of inventing an arrangement in which there is not one particle of truth according to the theory of the Appellant, and inserting it in the deed for the simple purpose—their Lordships can conceive no other object—of hampering themselves in carrying it out. All that invention was quite unnecessary if the parties meant nothing more than the equivalent of an ordinary mortgage. The evidence which is relied upon for the purpose of cutting down the deed and reducing the Bank's conveyance to the level of a redeemable right, consists of some letters which passed between the Bank and the late Mr. Barton between the 30th of March 1874 and the 27th of September 1876. The first of these letters was from the Bank to the deceased and simply intimates to him that, as his indebtedness in the books was still continuing, it was time that he executed a proper mortgage in their favour, the alternative presented being that he should arrange to release his properties by payment of the debt. On the 9th of April that communication is answered by the deceased in terms which show that he thoroughly understood and appreciated the difference between a mortgage of his land and a conveyance of it in fee. He mentions both alternatives in the letter, and in the conlusion of it he indicates his preference for an arrangement under which the Bank should take a conveyance of the land as in full payment of the debt. The next letter relied on was written by Mr. Barton, and was delivered to the Bank on the same day as the conveyance

was executed and delivered, and upon the terms of that letter there has naturally been a great deal of comment, because there are some expressions in it that might be characterised, if not as enigmatical, at all events as somewhat ambiguous. But the general purport and substance of the letter is beyond doubt. It sets forth that the Bank are to take a conveyance in part payment of the debt, and it also states that when they have taken a conveyance in part payment of the debt, the writer of the letter, Mr. Barton, will become personally liable if his means improve and his estate is able to afford it, for the whole or part of the difference between his total debt and the value of the land in question.

It is sufficient to say that, in the opinion of their Lordships, those expressions, "in part payment of the debt," "whole or part of the difference," are altogether inconsistent with the idea that the writer of the letter supposed for a moment that he was executing a conveyance which was to be a security for the whole debt. The letters that follow do not appear to their Lordships to cast any further light on the matter. Two years afterwards, in September 1876, the Bank sent a note in general terms, which seems to have been a feeler thrown out for the purpose of ascertaining whether their debtor was in a position to pay the balance or not, in which they call his attention to the fact that he had paid nothing towards his indebtedness, which might very well mean his liability for the balance, and they ask for a remittance. But that Mr. Barton, when he received the letter, understood that he was not called upon to pay the whole debt and release the property, is made perfectly clear by his answer of the 27th of September 1876. He reminds the Bank that his indebtedness was for the balance over and above what he terms the value of the property, and that his only

undertaking was to pay that difference if he was in a position to do so, and then goes on to state that his means have not improved, and that therefore they must not expect a remittance; and the Bank, being informed that such was the state of their debtor's finances, seem to have taken no further steps in the matter before his death, which did not occur until about five years afterwards. There really is, from the beginning to the end of the correspondence which has been so much relied on, not a single expression which bears out the idea that the relation of the parties was to be that of mortgagor and mortgagee, whilst on the contrary it is in entire consistency, from the beginning to the end, with the fact of the arrangement narrated in the deed of the 20th July 1874, having been the very arrangement which the parties had made, upon which they understood that they were acting, and by which their rights were governed.

The Appellant next relied upon the manner in which the Bank dealt with this transaction in their books. Now the entries in the books do not appear to show more than this, that from a period shortly after the date of that transaction in July 1874, the account was headed as in liquidation. In point of fact, the account was in suspense, because if the arrangement be taken as really having been made, part of it had been completed, and upon that part no claim could lie; and as to the other part the Bank possibly treated it as irrecoverable, because it was to be irrecoverable if their debtor was not in a position to pay. Then interest was calculated. That circumstance does not appear to their Lordships to be of much consequence, because although the interest was calculated in decimals by a clerk who had charge of the books, merely for the purpose of convenience if it required to be debited, in point of fact no interest was ever debited to Mr. Barton.

Then lastly, the heaviest indictment brought against the Bank upon the faith of these books was: Why was the payment to account not entered? Various reasons may be plausibly suggested why it was not credited to Mr. Barton. Their Lordships do not think it necessary to consider these. The absence of explanation upon the point is due to the party who complains of its absence, because had it not been for an objection taken by counsel for the Appellant, an explanation would have been given in some form or other. Their Lordships are not prepared to entertain an objection of that kind when it emanates from such a quarter, and in their opinion any inferences which may be derivable from the state of the Defendant's books, and the terms in which this transaction is entered therein, are, taking them in the most favourable aspect for the Appellant, quite insufficient to overcome the express and unequivocal terms of the indenture of the 20th of July 1874.

Their Lordships will accordingly humbly advise Her Majesty that the Judgment appealed from ought to be affirmed, and the Appellant must pay the costs of this Appeal.