

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Campbell v. the Commercial Banking Company of Sydney, and also on the Cross Appeal of the Commercial Banking Company of Sydney v. Campbell, from the Supreme Court of New South Wales; delivered, 15th February 1879.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS appeal and cross appeal have arisen out of long and complicated transactions between John Campbell the Plaintiff, and the Commercial Banking Company of Sydney, the Defendants, in the suit.

On the 29th of May 1867 the Plaintiff executed in favour of the Bank a memorandum of mortgage in the form prescribed by the "Real Property Act" of New South Wales, whereby he pledged, subject to a subsisting mortgage, three parcels of land, of which he was the registered proprietor in fee simple under the provisions of the Act, for the purpose of securing the repayment to the Bank of 5,000*l.*, advanced by them with interest at 9 per cent. per annum, to be paid or allowed with half-yearly rests on the 30th of June and 31st of December in each year during the continuance of the mortgage. These parcels may be shortly described as the Wharf property, "registered Volume XII., folio 246," the Coogee property "registered Volume XXX., folio 201," and the Warehouse property "registered Volume XXVIII., folio 51." By a memorandum indorsed upon or written under the principal instrument it appeared that the prior and subsisting incumbrance was registered as No. 207, and was a mortgage, dated 11th October 1864, to secure 3,500*l.* and interest to Francis Mitchell and George Wigram Allen. This mortgage in favour of the Bank was duly registered as No. 1607.

On the 28th of February 1870 the Plaintiff executed in favour of the Bank a similar memo-

randum of mortgage in the nature of a further charge upon the same premises for the purpose of securing the repayment of the further advance of 1,000*l.*, admitted to have been received, and also of any further advances the Bank might make to him, whether upon bills, promissory notes, or otherwise, with interest thereon. By a covenant in this instrument it was stated that the interest was to be at such rate per centum per annum as the Bank usually charged on similar transactions, and was to be payable or chargeable as before, with half yearly rests. This second mortgage was registered as No. 4513.

It is upon these two mortgages that the questions to be determined on this appeal principally arise. The Bank, however, held other securities, of which it is only necessary to particularize an equitable mortgage under an agreement executed by the Plaintiff, on the 29th of May 1867 (the date of the first-mentioned memorandum of mortgage) upon certain jetties attached to the Wharf property, not being lands subject to the provisions of the "Real Property Act," and a mortgage legal or equitable upon certain property of the Plaintiff, known as Ballina. The former, which seems to have covered also the Wharf and Warehouse properties, was expressed to be a security for the general balance due or to become due from Campbell to the Bank.

During the year 1870 and the first half of 1871, the parties were in a state of active hostility. On the Plaintiff's part he had brought an action against the Bank, claiming large damages in respect of a transaction with which we have no concern. On their part they had brought an action against him for the balance which they claimed to be due to them, and, notwithstanding an ineffectual attempt on his part to restrain that action by proceedings in equity, had recovered a judgment against him for a sum of between nine and ten thousand pounds. On this judgment they had taken out execution, and had seized and were about to sell through the Sheriff his interest in certain properties, including the three which were the subject of the mortgage of the 29th of May 1867.

In this state of things the negotiation for a settlement, which is contained in the correspondence set forth in the record, took place. Of this it is sufficient to state that the Plaintiff agreed to release, and did release his action; that the Bank abandoned their proceedings in execution, but insisted

upon his executing, as he did, a legal mortgage of the jetties with a power of sale ; that, early in June 1871, he went over the accounts with the officers of the Bank, when it appeared that after making certain deductions which he claimed, amounting to 1,512*l.* 5*s.* 11*d.*, there remained due from him a balance of 18,804*l.* 3*s.* 8*d.* ; and that, on the 16th of June 1871, the arrangement touching this balance, and the mortgages by which it, or any part of it, was secured, was embodied in the two following documents :—

“ Commercial Banking Company of Sydney.

“ Sydney, June 16th, 1871.

“ To Mr. John Campbell.

“ Sir,

“ In consideration of your agreeing to release, transfer, and surrender to the Commercial Banking Company of Sydney whenever required so to do your equity of redemption and interest of and in your Wharf, King Street, Coogee, ship and all other properties now under mortgage to the said Company (excepting that upon the Ballina property), and of your having given to them possession of the said properties, I hereby undertake and agree on the part of the said Company to release you personally from all claim and demand on their part in respect of any liability which you may now be under to them in respect of any balance of account, promissory note, or bills of exchange, it being, nevertheless, expressly understood that nothing herein contained shall prejudice the rights of the said Company against any other person liable for the payment of the said balance of account, promissory notes, or bills of exchange respectively, whether as drawers, acceptors, indorsers, or otherwise, or in respect of any securities held collaterally or otherwise against such liabilities.

“ For the Commercial Banking Company
of Sydney,

“ (Signed) T. A. DIBBS, Manager.”

“ To the Manager of the Commercial Banking
Company, Sydney.

“ Sir,

“ In consideration of your agreeing to release me personally from all claim and demand of the Commercial Banking Company of Sydney in respect of any liability which I may now be under to them in respect of any balance of account,

promissory notes, or bills of exchange, I hereby for myself, my heirs, executors, administrators, and assigns, agree to release, transfer, and surrender to them my equity of redemption and interest of and in my Wharf, King Street, Coogee, ship, and other properties respectively now under mortgage to the said Company (except the Ballina property), and when required to execute any deed or documents necessary for effecting such release, transfer, and surrender, and I hereby assent to the said Company taking immediate possession of the said several properties.

“Dated at Sydney this 16th day of June 1871.

“Signed) JOHN CAMPBELL.”

On this same 16th day of June 1871 the Plaintiff also signed the following memorandum:—

“Memorandum that I, the undersigned, John Campbell, of the city of Sydney, merchant, the registered proprietor of the properties comprised in the two certificates of title under the Real Property Act, registered, Vol. XXVIII., folio 51, and Vol. XXX., folio 201, do admit and acknowledge that all notices required by the said Real Property Act have been duly given to me by the mortgagees under the two several mortgages notified on the said certificates, namely, No. 1607, dated 29th May 1867, and No. 4503, dated 28th February 1870.”

The terms of this memorandum, and the fact that it was signed on the date at which the compromise was completed, afford strong grounds for believing that it was then the intention of both parties to effect the transfer of the mortgagor's registered title by proceedings under the 55th, 56th, and 57th sections of the Real Property Act,—a waiver of notice being treated as equivalent to a default after notice; and if this memorandum had not unfortunately and possibly from inadvertence omitted one of the three properties included in the mortgages in question, viz., the Wharf property, the present contest between the parties would never have arisen. But, however that may be, it is clear that the effect of this compromise of the 16th June 1871, and of the two documents above set forth, was to give the Bank, for good and sufficient consideration, an equitable title to the equity of redemption and other interest of the Plaintiff in the mortgaged premises, and to leave him no beneficial interest therein.

Their Lordships have thought it right to preface their consideration of the particular questions raised in the appeals by this statement of the earlier transactions between the parties, because it is by the unfortunate adoption of proceedings, ostensibly at least, inconsistent with the real rights and relations of these parties that the principal difficulties in this case have been occasioned.

The agreement of 1871 did not altogether rest *in fieri*. The Bank was put into possession of the mortgaged properties, other than Ballina, the Plaintiff becoming their tenant of two rooms in the warehouse. He presumably retained Ballina freed from the Bank's incumbrance. In October 1872, the Bank sold the Coogee property for 800*l.*, and the purchaser seems to have obtained the statutory certificate of title by means of the before-mentioned memorandum of waiver of the 16th of June 1871.

In the following month, however, a difficulty arose.

The Bank, having tried in vain to sell the wharf and warehouse properties by public auction for an adequate price, on the 19th of November 1872 entered into a private contract with one Mr. Struth for the sale to him of those properties, including apparently in the former the jetties attached to the wharf, for the lump sum of 9,000*l.*, subject to the conditions of sale embodied in the contract, and set forth at page 27 of the record. It was provided by one of these that the purchaser should, within seven days from the day of sale, tender to the vendor for execution a memorandum of transfer, in conformity with the provisions of the Real Property Act; and by another, that if the vendor should be unable or unwilling to remove any objections which the purchaser might be entitled to make under the conditions, the vendor should be at liberty to rescind the contract, and upon returning to the purchaser all moneys and securities deposited in pursuance of the contract, should not be liable to any sum for damages, costs, charges, or expenses incurred by the purchaser in or about the contract.

It is obvious that this contract could only be carried into effect by a transfer by means of the machinery of the Real Property Act of the statutory title in the properties, which, subject to the incumbrances thereon, continued to stand on the register in the name of the Plaintiff. For a direct transfer

of such a title by the person in whose name it is registered a form (Form D.) is prescribed by the Act.

The Bank, however, attempted to complete their contract, as in the case of the Coogee property; under the 55th and the following sections of the Statute, and would, no doubt, have succeeded in so doing if the memorandum of waiver of the 16th of June 1871 had included the wharf as well as the warehouse property.

The Registrar, however, seems to have objected that there was no waiver of notice as to the wharf property; and thereupon the Bank tendered to Mr. Campbell for his signature the further memorandum of waiver, which is set forth at page 67 of the record. This he refused to sign, saying that he had already signed papers enough, and would sign no more. The Bank about this time had obtained the transfer of the first mortgage upon the property, which has already been mentioned as having been granted in 1864 to Mitchell and Allen for 3,500*l.*, and registered as No. 207.

In this state of things the Bank, instead of taking the more direct and regular course of instituting proceedings in equity to compel the Plaintiff specifically to perform his contract of June 1871, so far as it remained unperformed, determined, in order to save time and expense, to proceed under the 55th and 56th sections of the Real Property Act, and accordingly served him with the notice (J) which is at page 23 of the record, their solicitors sending to him at the same time the letter (K). In reply he wrote to the Bank the letter (L). The effect of these documents will be afterwards considered. Nothing further seems to have been done by the Plaintiff, and on the expiration of the month limited by the notice, the Bank succeeded in obtaining from the Registrar the memorandum of transfer, dated the 25th of February 1873, in favour of Struth, which is to be found at page 19 of the record. The consideration expressed in this transfer is 8,800*l.* instead of 9,000*l.*; but the difference seems to be accounted for by the fact that the jetties, which were not subject to the provisions of the Real Property Act, were conveyed by a separate and ordinary deed for the expressed consideration of 200*l.*

The admitted effect of these transactions was to give to Struth an indefeasible title in the wharf and warehouse properties, and to leave to the Plaintiff, if he had been wronged by them, no

remedy but that of an action for damages against the Bank.

The Plaintiff accordingly in August 1876 commenced his action. His declaration altogether ignores the arrangement of June 1871, and all that had been done under it, though it does not complain of the sale of the Coogee property. His cause of action is in effect thus stated:—"The Defendants did not give to the Plaintiff the notice required by the Real Property Act to which he was entitled, but, on the contrary, gave him a notice purporting to be according to the provisions of the Act, by which they demanded the payment to them of an amount of money much larger than the amount then due to them on the said memorandums of mortgage, and after giving such notice refused to receive from the Plaintiff the amount of principal and interest which was then actually due on the said memorandums, although the Plaintiff was always ready and willing, and offered to the Defendants, to pay the said amount so then due to the Defendants, and the Defendants insisted upon the payment of the amount so as aforesaid claimed by them in the said notice, and which was as aforesaid far in excess of the amount then really due; and because the Plaintiff would not pay the larger sum, the Defendants, in part alleged exercise of their powers in that behalf, proceeded to and did in fact sell the firstly and thirdly before mentioned parcels of land, and the Plaintiff's estate and interest therein, to one John Struth," &c.

Their Lordships entirely concur with the Chief Justice in thinking that the real cause of action to be extracted from this confused statement is, that though the Plaintiff was ready and willing to pay what was really due, the Defendants refused to accept it. If, then, the Plaintiff's readiness and willingness to pay what was really due had been regularly put in issue, it would have lain on him to prove that issue.

The Defendants, however, before pleading, filed a demurrer, upon which, as the Chief Justice states, the Court held that the statements in the declarations which have already been set forth were equivalent to an allegation that a tender had been dispensed with by the Defendants. There was no appeal against that ruling, and the demurrer, its grounds, and the proceedings upon it, are not in

the printed record. Ultimately the Defendants pleaded,—1st, that they were not guilty; 2ndly, that they did give the notice required by law; 3rdly, that they did not dispense with the tender by the Plaintiff of the amount of principal and interest which was actually due on the memorandum of mortgage as alleged; and 4thly, that the sale in the declaration mentioned took place by the leave and license of the Plaintiff. On these four issues the parties went to trial, and there was a verdict for the Plaintiff for damages to the amount of 3,000*l.*

The Defendants thereupon moved the Court for a rule to show cause why the verdict should not be set aside, and a new trial had. They moved upon eight different grounds, viz.:—1st, that the verdict was against evidence and the weight of evidence; 2ndly, that the damages were excessive; 3rdly, that the Judge should have told the jury that there was no evidence of a dispensation by the Defendants with a tender of the amount actually due; 4thly, that he was wrong in holding that there was no evidence in support of the plea of leave and license; 5thly, that the Plaintiff was estopped by his deed from denying that he was indebted at that date to the Bank in the sum of 18,804*l.* 8*s.* 8*d.*, and that the Judge ought to have so ruled; 6thly, that the moneys paid by the Defendants in respect of certain past due endorsements were further advances under the mortgage, as were also the amounts paid for repairs to wharf, and other charges incidental to the management of the wharf property, and that the Judge should so have ruled; 7thly, that the Judge should have told the jury that the waiver of notice signed by the Plaintiff on the 16th of June 1871 was a waiver of notice as to all the properties under mortgage; 8thly, that the Judge ought to have told the jury that it was immaterial what amount was mentioned in the notice of demand, and that he should not have told the jury that the notice was bad if given for an amount unreasonably in excess of what was actually due.

The Court, on the 13th of March 1877, granted the rule to show cause moved for on the 1st, 3rd, and 8th of these grounds, but refused it upon the 2nd, 4th, 5th, 6th, and 7th. Upon the 21st of June 1877 the Court unanimously ordered that the verdict be set aside, and a new trial of the issues joined in the action be had. It further ordered

that the Plaintiff should pay to the Defendants their costs of, and occasioned by, and incident to the said motion.

The Plaintiff has appealed against this order absolute, and the Defendants have preferred a cross appeal against so much of the order made on the application for the rule *Nisi* as refused to grant that rule upon the 2nd, 4th, 5th, 6th, and 7th of the grounds on which it was moved for. Their Lordships have come to the conclusion that the Supreme Court of New South Wales was right in setting aside the verdict of the jury in this case, and further that there ought to be a new trial of the issues joined in the action generally. It appears to them that, if the case be regarded as one between a mortgagor and a mortgagee who had sold under the provisions of the Real Property Act, the Plaintiff must be taken to have failed to substantiate that which was the original foundation of his action, as stated in his declaration, viz., that he was ready and willing and offered to pay what was actually due upon the security. The decision on the demurrer, and the plea that was filed in consequence thereof, no doubt altered the question to be tried to this extent, that it lay upon the Plaintiff, instead of proving a tender, to excuse his not having made one, by proof that the Defendant had waived it. But it was essential to the maintenance of the action that the Plaintiff should prove that there had been the alleged dispensation by the Defendants of what he would otherwise have to show he had done, or was ready and willing to do.

Their Lordships concur with the learned Judges of the Supreme Court in thinking that, if there was any evidence to go to the jury on the issue raised by the third plea (a question which they do not decide, as there was no motion for a nonsuit) that evidence fell far short of being sufficient to support the finding of the jury in the Plaintiff's favour. Of express dispensation there is no evidence whatever.

The Plaintiff, however, invokes the authority of the decision in the "*Norway*," 3 Moore's P. C. C. N. S., 245. In that case it was undoubtedly ruled as between the master of a ship and the consignee of the cargo, that although the mere fact that the master claimed more than was due to him would not dispense with a tender on the part of the consignee of the freight really due, the demand of the larger sum might

be so made as to amount to an announcement by the master that it was useless to tender any smaller sum, for that, if tendered, it would be refused, and that, if this were shown, it would amount to a dispensation with any tender. The application of such a rule obviously depends upon the special facts of each particular case. In order to bring the present case within the rule, it is contended that the dispensation is legitimately to be inferred from the combination of the following circumstances: first, that the notice J demanded payment of the sum of 20,029*l.* 8*s.* 3*d.* as due upon the mortgages; secondly, that the letter K, after referring to the compromise and contract of the 16th of June 1871, contained an intimation that the service of the notice was without prejudice to the Plaintiff's undertaking to the Defendants under that arrangement, and that their only object in taking their present course was to save the time and the expense which would be incurred by suing in equity for a specific performance of that undertaking; and lastly, that they had already contracted to sell the premises comprised in the mortgage to Struth.

As to the first of these grounds, the learned Judges of the Supreme Court have held, and in their Lordships' opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less. Let it be granted that on the authority of the "Norway" such a refusal may be implied from the circumstances, and that an excessive and wrongful demand may be one of such circumstances. Looking at the memoranda of mortgage, and particularly at the stipulation in that of the 29th of February 1870 as to further advances, and looking at the accounts as subsequently rendered and settled, their Lordships are by no means satisfied that, if the relation of mortgagor and mortgagee had been re-established between the parties, and the account properly adjusted, the Bank might not have been found entitled to all it demanded, and that without calling in aid the principle of consolidation of mortgages, to which Mr. Justice Hargrave refers,

Mr. Justice Faucett, who tried the cause, says that nearly the whole of the 20,000*l.* demanded was unquestionably due by the Plaintiff, and their Lordships cannot think that even if there were some excess, it was so large or so wrongful as to justify an inference that the Defendants would refuse to accept what was justly due.

As to the two other circumstances relied upon, they no doubt support the theory that the Defendants never contemplated the redemption of the mortgaged premises when they took this mode of putting themselves in a position to complete the title of Struth as to one, and one only, of the properties contracted to be sold to him.

It does not, however, necessarily follow that if the Plaintiff, acting on the assumption that the Defendants by their conduct had re-established the relation of mortgagor and mortgagee, had offered to pay what was really due, they might not have accepted it. Indeed, if that sum had approached that claimed, it might have been for their interest to accept it, considering the amount realized by the sale, and the circumstance that by one of the conditions of sale they had protected themselves against any claim by Struth for damages by reason of the non-completion of the contract with him. The Plaintiff, however, did nothing but write the letter L, the effect of which, treating the mortgage as open, is merely to suggest that the account was to be stated on a principle clearly erroneous, and to say that if his principle were accepted he "would arrange" for the payment of the balance to be so arrived at, a balance far less than the amount actually due. It is pure matter of speculation what would have happened had he made a proper tender, or taken any of the other steps which Mr. Justice Faucett suggests as capable of being taken for the protection of his interests, real or supposed. He was content to do nothing, he allowed the proceedings to go on, and more than five years after the completion of Struth's title brought this action of damages. He ought not to be allowed to escape the necessity of proving the allegations essential to the maintenance of his action, by means of an inference from the acts and conduct of the Defendants which is not deducible from them by necessary implication.

Thus far their Lordships have agreed with the learned Judges of the Supreme Court. They are,

however, constrained to differ from them upon their ruling as to the amount of the damages awarded by the jury. The settlement of the 16th of June was not pleaded; and, therefore, the question whether it was a bar to the action, does not arise on the pleadings by way of defence. But the arrangement and all its circumstances were proved in the cause. The result was to show that, unless that arrangement had been completely and for all purposes rescinded, the Plaintiff had not any beneficial interest in the property sold. When, therefore, the question arose what damage he had really sustained by the wrongful sale of the property, if wrongful it were, the answer should have been "*nil.*"

The declaration ends with the following statement as to damages:—"Whereby the Plaintiff has lost and been deprived of the said lands so as aforesaid sold by the Defendants, and his the said Plaintiff's estate and interest therein, and the gains and profits which he would have made from the same," &c.

It appears to their Lordships that the settlement of 1871 cannot be treated as rescinded. Such a rescission could take place only by mutual agreement, or by some proceeding which would restore the parties to their original position. There has been no such proceeding, and there has been no such agreement. The Defendants, when they served the notice, expressly gave the Plaintiff notice that they reserved, and insisted on, their rights under the settlement. They completed the sale of the warehouse property in strict conformity with the settlement, and by means of the Plaintiff's memorandum of waiver of the 16th of June 1871, for that property is not included in Notice J. On the other hand, the Plaintiff has done nothing to reinstate the Defendants as mortgagors of Ballina or otherwise in their former position, if, indeed, it be possible to do so. Hence, if the Plaintiff were to show that he had sustained an actionable wrong by means of the Defendant's having got rid of his registered title to the wharf property, by an irregular proceeding he would not, in their Lordships' opinion, be entitled to damages calculated on the assumption of his having a beneficial interest in the property, or, indeed, to any but nominal damages.

Upon the other points raised by the cross appeal their Lordships do not think it necessary to say much. If the question had been as to the actual sale to Struth, there was, no doubt, abundance of evidence to prove leave and license which should have been brought to the notice of the jury. But the sale in the declaration mentioned, and as such referred to in the plea, is one not made in conformity with the settlement of the 16th of June 1871, or by means of the actual contract with Struth, but one alleged to have been made subsequently to the notice, and by virtue of the power of sale given by the Real Property Act. Mr. Benjamin, as to the 5th ground on which the rule *Nisi* was moved for, admitted that he could not contend there was an actual estoppel; though, and in that their Lordships agree, the admission in the deed referred to might be pregnant evidence as to the state of the accounts. Their Lordships, not having gone fully into those accounts, desire to say no more of the 6th ground than that the moneys paid by the Defendants in respect of the past due endorsements would seem, *prima facie*, to fall within the category of further advances under the mortgages. The 7th ground, however, seems to be wholly unsustainable. Whatever the intention of the parties may have been, the wharf property was, in point of fact, omitted from the waiver of notice; and it could not be the duty of the Judge to tell the jury that they were to treat it as included therein. Nor is it easy to see how such a direction could have affected the result of the trial.

A point that has not yet been noticed has also been raised by the Plaintiff's appeal. It is that of the propriety of ordering the Plaintiff to pay to the Defendants their costs of and incident to the motion. Their Lordships conceive that this question of costs must be regulated by the practice of the Supreme Court of New South Wales, and do not think it would be right to interfere with the discretion of the learned Judges concerning it.

The result is that their Lordships will humbly advise Her Majesty to dismiss the appeal of the Plaintiff and to allow the appeal of the Defendants; and to affirm the order of the 21st of June 1877, which is in terms one for a new trial generally. It does not appear to them to be necessary to advise Her Majesty to make any further order upon the questions raised by the Defendants' appeal. They

have sufficiently indicated their opinion upon those questions, and have no doubt that if the case should ever come on for a second trial due weight will be given to them.

The Respondents' costs of the appeal must be paid by the Appellant..